

RECORD OF TRIAL

COVER SHEET

**IN THE
MILITARY COMMISSION
CASE OF**

UNITED STATES

V.

JABRAN SAID BIN AL QAHTANI

ALSO KNOWN AS:

**SALAM AL FARSI-----HATEB
JABRAN AL QAHTAN-----JABRAN WAZAR
SAAD WAZAR HATIB JABRAN
JABRAN SAAD WAZAR SULAYMAN**

No. 050007

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VOLUME ____ OF ____ TOTAL VOLUMES

1ST VOLUME OF TRANSCRIPT: R. 1-139

APRIL 25, 2006 SESSION

United States v. Jabran Said Bin al Qahtani, No. 050007

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A more detailed index for each volume is included at the front of the particular volume concerned. An electronic copy of the redacted version of this record of trial is available at <http://www.defenselink.mil/news/commissions.html>.

Some volumes have not been numbered on the covers. The numerical order for the volumes of the record of trial, as listed below, as well as the total number of volumes will change as litigation progresses and additional documents are added.

After trial is completed, the Presiding Officer will authenticate the final session transcript and exhibits, and the Appointing Authority will certify the records as administratively complete. The volumes of the record of trial will receive their final numbering just prior to the Appointing Authority's administrative certification.

Transcript and Review Exhibits are part of the record of trial, and are considered during appellate review. Volumes I-VI, however, are allied papers and as such are not part of the record of trial. Allied papers provide references, and show the administrative and historical processing of a case. Allied papers are not usually considered during appellate review. See generally *United States v. Gonzalez*, 60 M.J. 572, 574-575 (Army Ct. Crim. App. 2004) and *United States v. Castleman*, 10 M.J. 750, 751 (AFCMR 1981) and cases cited therein discussing when allied papers may be considered during the military justice appellate process, which is governed by 10 U.S.C. § 866). For more information about allied papers in the military justice process, see Clerk of Military Commission administrative materials in Volume III.

VOLUME
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SUBSTANCE OF CONTENTS

ALLIED PAPERS Not part of "record of trial"

- | | |
|-----------------------|---|
| I¹ | Military Commission Primary References (Congressional Authorizations for Use of Force; Detainee Treatment Act; UCMJ articles; President's Military Order; Military Commission Orders; DoD Directive; Military Commission Instructions; Appointing Authority Regulations; Presiding Officer Memoranda—including DoD rescinded publications) |
| II¹ | Supreme Court Decisions: <i>Rasul v. Bush</i>, 542 U.S. 466 (2004); <i>Johnson v. Eisentrager</i>, 339 U.S. 763 (1950); <i>In re Yamashita</i>, 327 U.S. 1 (1946); <i>Ex Parte Quirin</i>, 317 U.S. 1 (1942); <i>Ex Parte Milligan</i>, 71 U.S. 2 (1866) |

¹ Interim volume numbers. Final numbers to be added when trial is completed.

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UNITED STATES V. JABRAN SAID BIN AL QAHTANI,
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Session of April 25, 2006

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The Chief Defense Counsel has detailed the Defense Counsel (RE <u>6</u>)	<u>8</u>
The Presiding Officer explained to the Accused his various options for counsel to defend him before the Commission. The Accused declines counsel, stating that he does not need one. The Accused states that he prefers to “be ignorant in these matters.” After being advised of the benefits of counsel, and the risks of going without counsel, the Accused states that he does not care, and does not want to understand.	<u>8-14</u>
The Accused at one point states that this is nonsense and, “The lawyer is unable to defend charges that I am saying that I committed . . .”	<u>9-10</u>

**UNITED STATES V. JABRAN SAID BIN AL QAHTANI,
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The Defense Counsel asked for a delay to consult with the State Bar of Kentucky and the Army Standards of Conduct Office, regarding an ethical issue concerning representing the Accused, who does not want representation. He has reported his ethical dilemma to the Chief Defense Counsel (R. 18).	<u>14-18</u>
After a recess, the Accused did not return to the hearing, and the Defense Counsel indicated the Accused's absence was voluntary.	<u>19-24</u>
Defense Counsel advised the Commission that the Kentucky State Bar and the Army Standards of Conduct office told him to present the best defense he was capable of presenting. Defense Counsel disagreed with this advice and wanted a delay to get written opinions.	<u>24-25</u>
The Presiding Officer directed Defense Counsel to continue to represent the Accused.	<u>25-27</u>
The Presiding Officer provided written information about his background to assist counsel with voir dire (RE <u>3</u> and <u>36</u>).	<u>27</u>
The Prosecution had no voir dire	<u>28</u>
In response to Defense Counsel's questions, the Presiding Officer addressed the following general areas during voir dire:	
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2. Friends or relatives who were victims of 9/11 or served in Afghanistan or Iraq	<u>30-32</u>
3. Presiding Officer's prior military assignments, especially work in the Navy General Counsel's office for 18 months. The Presiding Officer had limited input on setting up the Combatant Status Review Tribunals. He did not recall working with the General Counsel on a 2004 memorandum	

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concerning improper interrogation techniques. This memorandum is (RE 59).	32-42; 58
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7. Presiding Officer's service in a combat zone	55
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The Prosecution did not challenge the Presiding Officer.	61
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The Defense Counsel stated that the Accused voluntarily decided not to return to the proceedings.	70-72
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2. The Presiding Officer approved discovery orders without forcing the prosecution to do sufficient work and meet	

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Description of Exhibit	PAGE No.
deadlines.	<u>83-88</u>
3. Employment of a relative of the Presiding Officer by the Department of Defense (Sealed).	<u>88-89</u>
4. The AAPO's relationship with the Department of Homeland Security and his teaching role.	<u>89-101</u>
The Prosecution opposed the Defense Counsel's challenge for cause of the Presiding Officer.	<u>102-105</u>
The Presiding Officer denied the Defense Counsel's challenge for cause. The Presiding Officer made some findings and then stated that he will append his complete findings to the record at a later date (R. 108).	<u>106-108</u>
All persons have the requisite qualifications, and have been sworn.	<u>108</u>
The Accused was served with the charges in English and Arabic.	<u>108</u>
The Prosecutor read the charges.	<u>109-120</u>
The Presiding Officer discussed Protective Orders with the parties (REs <u>18, 19</u> and <u>57</u>).	<u>122-123</u>
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The Presiding Officer granted the Defense Counsel's request and deferred motions and pleas.	<u>124</u>
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1 The Commissions Hearing was called to order at 0918, 25
2 April 2006.

3

4 [Throughout this transcript, Captain Daniel O'Toole, U.S.
5 Navy, will be referred to as the Presiding Officer or PO.
6 Lieutenant [REDACTED] U.S. Navy Reserve, will
7 be referred to as the Prosecutor or PROS. Captain [REDACTED]
8 [REDACTED] U.S. Air Force, will be referred to as Assistant
9 Prosecutor or APROS. Lieutenant Colonel Bryan Broyles,
10 U.S. Army, will be referred to as Defense Counsel or DC.]

11

12 **PRESIDING OFFICER:** This Military Commission is called to
13 order.

14 I note that the accused is absent. Please, bring
15 in the accused.

16

17 [The accused entered the courtroom.]

18

19 **PRESIDING OFFICER:** Mr. al Qahtani, you have the right to
20 be present at all open sessions of these
21 proceedings. If you become disruptive, you will
22 give up the right to be present, and I may have
23 you removed from the courtroom. There are

1 certain choices you have a right to make; and, if
2 you're disruptive, and I have you removed from
3 this hearing room, you will not be present to
4 make those choices; and, if you're removed, you
5 will not be present to participate in your own
6 defense, during the open sessions of this
7 Commission.

8
9 Would the prosecutor, please, state the
10 jurisdictional basis for this Military
11 Commission.

12
13 **APROS::** This Military Commission is appointed by
14 Appointing Order Number 05-0008, dated 16
15 December 2005; as amended by Appointing Order
16 Number 06-0006, dated 1 February 2006; and
17 further amended by Appointing Order Number 06-
18 0010, dated 27 March 2006, copies of which have
19 been furnished to the Presiding Officer, counsel,
20 and the accused.

21
22 Appointing Order 05-0008 has been marked as
23 Review Exhibit 5, and Appointing Order 06-0006

1 and 06-0010 have been marked as part of Review
2 Exhibit 53 and attached to the record.

3
4 The Presidential Determination that the accused
5 may be subject to trial by Military Commission
6 has been marked as Review Exhibit 1 and has
7 previously been shown to the defense.

8
9 The charges have been marked as Review Exhibit 2
10 and have been properly approved by the Appointing
11 Authority and referred to this Commission for
12 trial. The approval of the charges and their
13 referral to this Commission have been marked as
14 Review Exhibits 3 and 4 respectively.

15
16 The prosecution caused a copy of the charges in
17 English and Arabic, the accused's native
18 language, to be served on the accused on 30
19 November 2005.

20
21 The prosecution is ready to proceed in the
22 Commission trial of United States v. Jabran Said
23 Bin al Qahtani.

1 The accused, the Presiding Officer, and all
2 detailed counsel are present.

3
4 A court reporter has been detailed reporter for
5 this Commission and has been previously sworn.
6 Security personnel have been detailed for this
7 Commission, and have been previously sworn.

8
9 **PRESIDING OFFICER:** Thank you. I've been designated as the
10 Presiding Officer of this Military Commission by
11 the Appointing Authority, and I have been sworn.

12
13 Before continuing with any other preliminary
14 matters, I need to inquire into the accused's
15 need for an interpreter translator. Before doing
16 so, however, I note that from the beginning of
17 the proceedings this morning, there has been and
18 there continues to be a simultaneous translation
19 from English to Arabic which is being transmitted
20 into the courtroom as well as to the headphones
21 that are seated before the accused.

1 Mr. al Qahtani, are you able to hear and
2 understand the translation?

3

4 **ACC:** I don't want this court. You judge and you
5 sentence me, if this is God's will. A nation
6 that is an enemy of God is not a leader and
7 cannot be a leader.

8

9 **PRESIDING OFFICER:** Let me interrupt you for just a moment.

10 Apparently your response is unresponsive to my
11 question, so I will presume that you do need a
12 translator to assist you. I am directing that
13 the simultaneous translation be continued to be
14 broadcast in the courtroom. And I will ask if
15 you have a defense translator with you this
16 morning?

17

18 [Pause.]

19

20 **PRESIDING OFFICER:** No response from the accused. So let
21 me address the gentlemen seated to the accused's
22 right. Sir, are you the defense translator.

23

1 **Defense Trans:** Yes, sir.

2

3 **ACC:** I don't want an attorney. I don't want a court.

4

5 **PRESIDING OFFICER:** I understand and we will get to that in

6 just a moment. First I want to ensure that the

7 defense translator is qualified to translate.

8 Are you sir?

9

10 **Defense Trans:** Yes.

11

12 **PRESIDING OFFICER:** And have you been previously sworn?

13

14 **Defense Trans:** Yes, I have.

15

16 **PRESIDING OFFICER:** And is your name and qualifications

17 been submitted to the record in this matter?

18

19 **Defense Trans:** Yes.

20

21 **PRESIDING OFFICER:** And I note that that is Review Exhibit

22 55.

23

1 Would the prosecutor please state by whom you
2 have been detailed and your legal qualifications?

3

4 **APROS:** All members of the prosecution have been detailed
5 to this Military Commission by the Chief
6 Prosecutor. All members of the prosecution are
7 qualified under Military Commission Order Number
8 1, paragraph 4(b) and we have been previously
9 sworn. No member of the prosecution has acted in
10 any matter which tend to disqualify us in this
11 proceeding. The detailing document has been
12 marked as Review Exhibit 12.

13

14 And sir, the prosecution also has sitting at the
15 prosecution table an assistant who will assist
16 the prosecution but will not be representing the
17 government.

18

19 **PRESIDING OFFICER:** Thank you. Would the military defense
20 counsel please state by whom you have been
21 detailed and your qualifications?

22

1 **DC:** Yes, sir. I have been detailed to this Military
2 Commission by the Chief Defense Counsel. I am
3 qualified under Military Commission Order Number
4 1, paragraph 4(c), and have previously been
5 sworn. I have not acted in any matter that might
6 tend to disqualify me in this proceeding. The
7 document detailing me to this case is marked as
8 Review Exhibit 6.

9
10 **PRESIDING OFFICER:** Mr. al Qahtani, according to Military
11 Commission Order Number 1, a military lawyer has
12 been assigned to represent you. He is your
13 detailed defense counsel. Your detailed defense
14 counsel is provided to you at no cost to you.
15 You may also request a different military lawyer.
16 If the military lawyer you request is reasonably
17 available, that lawyer would be appointed to
18 represent you and that lawyer would also
19 represent you free of charge.

20
21 In addition, you may be represented by a civilian
22 lawyer, however, a civilian lawyer would
23 represent you at no cost to the United States,

1 and that civilian lawyer must be qualified. In
2 order to be qualified, a civilian lawyer whom you
3 wish to represent you must be a United States
4 citizen, must be admitted to the practice of law
5 in a state, district, territory, or possession of
6 the United States or a U.S. Federal Court, may
7 not have been sanctioned, or disciplined for any
8 relevant misconduct, must be eligible for a
9 secret clearance, and must agree in writing to
10 comply with the orders, rules, and regulations of
11 this Military Commission.

12
13 If a civilian lawyer represents you, your
14 detailed defense counsel will also continue to
15 represent you and that military lawyer will be
16 present during all the presentation of evidence.

17
18 Mr. al Qahtani, do you understand what I have
19 just told you?

20
21 **ACC:** This is nonsense.

1 **PRESIDING OFFICER:** Do you have any questions about your
2 rights before this Commission to counsel?

3

4 **ACC:** I need to ask a question. This lawyer, what is
5 he defending me?

6

7 **PRESIDING OFFICER:** We will have the charges read in just a
8 moment.

9

10 **ACC:** No problem.

11

12 **PRESIDING OFFICER:** Thank you. Do you wish to be
13 represented by your detailed defense counsel?

14

15 **ACC:** The lawyer is unable to defend charges that I am
16 saying that I committed and by God and God
17 willing you will regret--you will regret that you
18 have imprisoned me and this kind of lawyer cannot
19 defend me.

20

21 **PRESIDING OFFICER:** Very well. Do you wish to request a
22 different military lawyer?

23

1 **ACC:** No, I would not this attorney. I don't want an
2 attorney. I am waiting either for you to kill
3 me, or imprison me, or for God to rescue me, and
4 then you will regret it.

5

6 **PRESIDING OFFICER:** Do you wish to be represented by a
7 civilian lawyer?

8

9 **ACC:** No.

10

11 **PRESIDING OFFICER:** Very well, by whom do you wish to be
12 represented?

13

14 **ACC:** In what?

15

16 **PRESIDING OFFICER:** During these Commission proceedings.

17

18 **ACC:** I don't need a lawyer.

19

20 **PRESIDING OFFICER:** Mr. al Qahtani, do you understand that
21 a lawyer has the experience and training in trial
22 procedures that are needed to best argue your
23 position during this trial?

1

2 **ACC:** I would like to be ignorant in these matters.

3

4 **PRESIDING OFFICER:** Do you understand that you would be
5 better off with a trained lawyer who is familiar
6 with the law and rules applicable to these
7 Military Commissions.

8

9 **ACC:** I don't care.

10

11 **PRESIDING OFFICER:** Do you understand that you might not be
12 permitted access to certain classified or
13 protected information and without access to that
14 information, you would be at a significant
15 disadvantage in presenting your case?

16

17 **ACC:** Yes, good.

18

19 **PRESIDING OFFICER:** Do you understand that your detailed
20 defense counsel will have access to all the
21 information that is to be introduced against you
22 and that he will be present, even during closed
23 sessions of this trial, and during closed

1 sessions, if any are required, you might not be
2 present? Do you understand this?

3

4 **ACC:** I don't want to understand.

5

6 **PRESIDING OFFICER:** In view of all I have told you, do you
7 wish to be represented by your detailed defense
8 counsel?

9

10 **ACC:** No.

11

12 **PRESIDING OFFICER:** Do you wish a different military lawyer
13 to represent you?

14

15 **ACC:** No.

16

17 **PRESIDING OFFICER:** Do you wish to request a civilian
18 lawyer to represent you?

19

20 **ACC:** No.

21

1 **PRESIDING OFFICER:** Very well, Lieutenant Colonel Broyles,
2 you previously indicated that you are the
3 detailed defense counsel.

4
5 **DC:** Yes, sir.

6
7 **PRESIDING OFFICER:** Are you ready to proceed?

8
9 **DC:** I would ask that I be given a delay in the normal
10 proceedings of this session, that is, the voir
11 dire of the Presiding Officer, which was the only
12 substantive matter pending before this session.

13
14 **PRESIDING OFFICER:** And what----

15
16 **DC:** To consult with the State Bar of Kentucky and the
17 Standards of Conduct Office for the United States
18 Army.

19
20 **PRESIDING OFFICER:** The State Bar of Kentucky and whom
21 else?

22

1 **DC:** The Standards of Conduct Office for the United
2 States Army JAG Corps, sir.

3

4 **PRESIDING OFFICER:** And why do you need delay to request
5 contact with the state bar and the Army?

6

7 **DC:** My view of my obligation to my client dictates
8 that at this point I would take no action on his
9 behalf, sir. I don't believe that is in his best
10 interests. I think he is best served by a
11 vigorous defense and I don't believe I can do
12 that under the conditions of the representation
13 right now, sir.

14

15 **PRESIDING OFFICER:** Well is taking no action illegal?

16

17 **DC:** No, sir.

18

19 **PRESIDING OFFICER:** Is it unethical?

20

21 **DC:** No, sir--well let me rephrase that.

22

1 **PRESIDING OFFICER:** Well then what do you need to ask your
2 bar?

3

4 **DC:** If I could, sir, I do not believe that I am
5 sufficiently versed in the nuances of an ethical
6 situation such as this to categorically waive a
7 substantial right of the accused based on my
8 interpretation.

9

10 **PRESIDING OFFICER:** I am not sure I understood your
11 response. Is it unethical for you to take no
12 action at the request of your client?

13

14 **DC:** My untrained view of my rules of ethics in these
15 circumstances would be that that would be the
16 ethical course of conduct; would be to take no
17 action.

18

19 **PRESIDING OFFICER:** You say, "untrained," Lieutenant
20 Colonel Broyles, how long have you been an
21 attorney?

22

23 **DC:** Eighteen years, sir.

1

2 **PRESIDING OFFICER:** And roughly how many clients have you
3 represented?

4

5 **DC:** In the neighborhood of 400, sir.

6

7 **PRESIDING OFFICER:** And do I correctly assume that you had
8 ethics training in law school?

9

10 **DC:** Yes, sir, and I also instructed United States
11 Prosecutors on ethics.

12

13 **PRESIDING OFFICER:** Well then I don't accept your
14 characterization of yourself as, "untrained."
15 You also had annual ethics training requirements?

16

17 **DC:** Yes, sir. I only represent "untrained" in the
18 sense of, I view this as a relatively unique
19 ethical situation that is beyond my capacity to
20 understand, sir--beyond my capacity to interpret
21 the rules in what is a situation which has never
22 presented itself to myself or to anyone I know
23 outside of the Commissions.

1

2 **PRESIDING OFFICER:** Let me ask you to step a little closer
3 to the microphone.

4

5 Well here is what we will do, well first let me
6 ask you, have you read your detailing letter?

7

8 **DC:** Of course, sir.

9

10 **PRESIDING OFFICER:** And if I recall correctly, your
11 detailing letter required you to report ethical
12 conflicts to the Chief Defense Counsel?

13

14 **DC:** Yes, not just the detailing letter, but yes,
15 generally that would be true, yes, sir.

16

17 **PRESIDING OFFICER:** And have you done that?

18

19 **DC:** Yes, sir.

20

21 **PRESIDING OFFICER:** Well, I will--it is 5 minutes to 10:00,
22 since I understand you learned of this dilemma
23 this morning, I will take a 1-hour recess, during

1 which time you can do whatever research or
2 contact whom you believe necessary to present to
3 me the basis for further delay.

4

5 **DC:** Yes, sir.

6

7 **PRESIDING OFFICER:** So the court will be in recess until
8 11:00. This court is recess.

9

10 *The Commission Hearing recessed at 0954, 25 April 2006.*

11

12 *The Commission Hearing was called to order at 1110, 25*
13 *April 2005.*

14

15 **PRESIDING OFFICER:** This Military Commission is called to
16 order.

17

18 **APOS:** All parties present when the Commission recessed
19 are again present with the exception of the
20 accused and the defense translator.

21

1 **PRESIDING OFFICER:** Thank you. Lieutenant Colonel Broyles,
2 can you inform the Commission why your client is
3 absent?
4
5 **DC:** Yes, sir.
6
7 **PRESIDING OFFICER:** May I ask you, please, step behind the
8 microphone.
9
10 **DC:** Sorry, sir.
11
12 **PRESIDING OFFICER:** And in the absence of the accused, we
13 need not continue the translation, if that's
14 ongoing to the headphones. Colonel, please
15 inform the Commission.
16
17 **DC:** The accused by his choice has chosen not to
18 return to this session of the trial, sir.
19
20 **PRESIDING OFFICER:** And by his choice, you mean he's made a
21 voluntary decision not to attend?
22
23 **DC:** That is correct, yes, sir.

1

2 **PRESIDING OFFICER:** And do you know why he is refusing to
3 come?

4

5 **DC:** Pursuant to his decision to deny the legality of
6 these proceedings in their entirety and his
7 desire to participate in no part of these
8 proceedings.

9

10 **PRESIDING OFFICER:** Do you wish for me to direct he be
11 brought in by force, if necessary?

12

13 **DC:** No, sir.

14

15 **PRESIDING OFFICER:** Is there anything short of force that
16 you are aware of that would allow him to attend?

17

18 **DC:** I believe some level of force would be required,
19 yes, sir.

20

21 **PRESIDING OFFICER:** Do you wish me to direct that be
22 employed?

23

1 **DC:** No, sir.

2

3 **PRESIDING OFFICER:** Are you convinced that the accused is
4 absent as a result of a freely made decision on
5 his part?

6

7 **DC:** Yes, sir.

8

9 **PRESIDING OFFICER:** Is that an informed decision?

10

11 **DC:** An incorrect but an informed one, yes, sir.

12

13 **PRESIDING OFFICER:** By that, do you mean you disagree with
14 it but it is informed?

15

16 **DC:** That is correct, sir.

17

18 **PRESIDING OFFICER:** He has all the information at his
19 disposal he needs to make a choice whether to
20 attend or not attend?

21

22 **DC:** Yes, sir.

23

1 **PRESIDING OFFICER:** And have you, over the course of the
2 break, had an opportunity to discuss his
3 attendance with him?

4

5 **DC:** Yes, briefly, sir.

6

7 **PRESIDING OFFICER:** Have you had sufficient time to discuss
8 that with him?

9

10 **DC:** Yes, sir.

11

12 **PRESIDING OFFICER:** Very well. I find that the accused is
13 absent due to his voluntary refusal after making
14 an informed decision and I find this particularly
15 in view of the fact that earlier this very
16 morning I've fully informed him of his rights to
17 attend; the choices that he has a right to make;
18 and that if he were not in attendance, he would
19 not be present to participate in his own defense
20 or make those choices. I find that the defense
21 has requested that force not be employed in view
22 of the informed choice of the accused, I'm not
23 inclined to require force be applied if he

1 chooses to absent himself from these proceedings.

2 With that, we will now continue.

3

4 Colonel Broyles, during the recess, I requested
5 that you pursue such information as you believe
6 that you need in order to justify your request
7 for a delay in these proceedings. Can you advise
8 me as to your position?

9

10 **DC:** I still believe that a request for delay is
11 necessary, however, I have received an answer
12 from both the Kentucky State Bar Ethics Advisor
13 and the Standards of Conduct Office from the
14 United States Army Judge Advocate General Corps.

15

16 **PRESIDING OFFICER:** And what is your position?

17

18 **DC:** The advice given to me, sir, was to present the
19 best defense I was capable of presenting. While
20 I find this in conflict with my own view of Rule
21 of Ethics 1.2, which defines the accused the
22 right to define the goals of the representation
23 entirely on his own and I believe that presenting

1 an aggressive defense is contrary to the goal
2 that he has given me in his representation. I've
3 been given advice by the ethics counsel of both
4 Kentucky and the Army to proceed.

5 I do, however, and the reason I continue to
6 request a delay is I have both decisions from
7 each of those agencies and I have no written
8 opinion. Obviously, the nature of the
9 information and the depth of the discussion was
10 limited by the fact that this was taking place
11 over a phone and in the course of about an hour.
12 Given that it conflicts with what my own view of
13 what the ethics rules are, while I am certainly
14 willing to proceed forward based on their advice,
15 I believe the more prudent course of action would
16 be to delay this proceeding until such time as I
17 could receive written, specific advice from these
18 agencies.

19
20 **PRESIDING OFFICER:** Well, I've also reviewed Rule 1.2 and
21 it seems to me that the plain language of the
22 rule sets forth the parameters of attorney-client
23 representation. It allows the client to decide

1 the strategic goal of representation while
2 leaving to the discretion of the attorney the
3 means by which to accomplish that.
4 Do you disagree with that?

5

6 **DC:** No, sir, I agree with that. Yes, sir.

7

8 **PRESIDING OFFICER:** Very well. Then your request is
9 denied. You may, of course, continue to pursue
10 such information or opinions as you believe is
11 needed to properly bring issues before the
12 Commission. However, at this time, I find that
13 you have not properly raised an ethical conflict
14 based on both the plain reading of the rule and
15 the ethics opinion, informal though it may be, of
16 the Kentucky Bar and the Ethics Office of the
17 Army Judge Advocate General. With respect to
18 proceeding with voir dire, which was the only
19 thing on the docket to do today, are you prepared
20 to go forward with voir dire?

21

22 **DC:** Yes, sir.

23

1 **PRESIDING OFFICER:** Very well. I've previously provided
2 counsel for both sides a summarized biography,
3 which appears as Review Exhibit Number 3. And
4 though I offered to provide additional
5 information in response to written questions,
6 neither side at this point has provided me with
7 any questions. As a result, I have provided
8 counsel with supplemental information concerning
9 matters that counsel would ordinarily be expected
10 to inquire into during the voir dire process of
11 the presiding officer, these matters have been
12 marked Review Exhibit 36. And I still have not
13 received any written questions from any counsel
14 assigned to this case.

15

16 So let me ask, have counsel from both sides
17 reviewed these two review exhibits?
18 Prosecution?

19

20 **APOS:** We have reviewed the information, sir.

21

22 **PRESIDING OFFICER:** Defense?

23

1 DC: Yes, sir.
2
3 PRESIDING OFFICER: Thank you. Does prosecution desire to
4 conduct voir dire of the Presiding Officer?
5
6 APOS: The prosecution has no voir dire, sir.
7
8 PRESIDING OFFICER: Thank you. Does the defense desire to
9 conduct voir dire of the Presiding Officer?
10
11 DC: Yes, sir, subject to the same objections I've
12 previously made.
13
14 PRESIDING OFFICER: You may proceed.
15
16 DC: Sir, do you currently have any relatives serving
17 in the Armed Forces?
18
19 PRESIDING OFFICER: Yes, I do.
20
21 DC: And how close of relatives are they, sir?
22
23 PRESIDING OFFICER: [REDACTED]

1

2 DC: Is he serving in a combat function?

3

4 PRESIDING OFFICER: He is not.

5

6 DC: Is he serving in a combat zone?

7

8 PRESIDING OFFICER: He is not.

9

10 DC: Do you know if he has been affected by any of the
11 events in what is commonly referred to as "The
12 War on Terror?" That is the war in Afghanistan
13 or Iraq.

14

15 PRESIDING OFFICER: He has not.

16

17 DC: Do you have any friends that you are close to
18 that have been in combat or have been injured or
19 affected by combat?

20

21 PRESIDING OFFICER: I am aware of none.

22

23 DC: Same question for your [REDACTED] relatives, sir.

1

2 **PRESIDING OFFICER:** I'm not aware of any.

3

4 **DC:** Do you know any military member that you have
5 worked with on a regular basis that has been
6 affected by the wars in Iraq or Afghanistan?

7

8 **PRESIDING OFFICER:** I'm not aware of any.

9

10 **DC:** Did you know of anyone that was in the Pentagon
11 at the time of the 9/11 Attack?

12

13 **PRESIDING OFFICER:** Yes.

14

15 **DC:** And have you spoken to them about those matters?

16

17 **PRESIDING OFFICER:** I have not. Well, let me ask you, what
18 matters are you talking about?

19

20 **DC:** The attack itself and its impact on them, sir.

21

22 **PRESIDING OFFICER:** Yes.

23

1 **DC:** Were they injured by the attack?

2

3 **PRESIDING OFFICER:** No.

4

5 **DC:** And did they have an opinion that they expressed

6 regarding the attacks?

7

8 **PRESIDING OFFICER:** An opinion?

9

10 **DC:** Regarding the nature of the attacks.

11

12 **PRESIDING OFFICER:** No, I don't recall that. I mean, I

13 recall----

14

15 **DC:** Not necessarily normal conversation that you've

16 had.

17

18 **PRESIDING OFFICER:** I'm telling you that it was a scary

19 thing that happened.

20

21 **DC:** Was this an active duty officer?

22

23 **PRESIDING OFFICER:** No, it was a civilian.

1

2 **DC:** A civilian employee.

3 Sir, you worked in the General Counsel's Office.

4

5 **PRESIDING OFFICER:** I did.

6

7 **DC:** For how long?

8

9 **PRESIDING OFFICER:** Approximately 18 months.

10

11 **DC:** During that 18 months, they were working on

12 matters relating to Guantanamo, is that correct?

13

14 **PRESIDING OFFICER:** You mean the Navy General Counsel?

15

16 **DC:** Yes, sir.

17

18 **PRESIDING OFFICER:** Towards the end of my tour, the

19 Secretary of the Navy was tasked with setting up

20 the--I guess they call them, Status Review

21 Boards.

22

23 **DC:** Yes, sir.

1

2 **PRESIDING OFFICER:** And the Navy General Counsel assisted
3 with that.

4

5 **DC:** And did you staff those actions, sir?

6

7 **PRESIDING OFFICER:** Yes, I did.

8

9 **DC:** Did you write a legal opinion on any of those
10 actions?

11

12 **PRESIDING OFFICER:** I'm not aware that I was asked for a
13 legal opinion. My role was principally
14 scheduling meetings, attending meetings, taking
15 notes, editing documents. There were other
16 lawyers assigned to the committee that was
17 working those issues that were specifically to
18 provide the legal input. I was not in that role.

19

20 **DC:** In the course of that employment, however,
21 working with Mr. Mora, would you have engaged in
22 discussions regarding these matters?

23

1 **PRESIDING OFFICER:** The matters of the status boards?

2

3 **DC:** Yes, sir.

4

5 **PRESIDING OFFICER:** I would have observed them. I don't
6 recall other than as I say staffing issues in
7 terms of coordination of paperwork and opinions,
8 I don't recall any conversations that where I was
9 solicited my legal views.

10

11 **DC:** Did you ever express a personal opinion as to the
12 legality of those sessions?

13

14 **PRESIDING OFFICER:** I did not.

15

16 **DC:** As to the people within the office, did you ever
17 have a chance to hear the opinions of those other
18 people in the office regarding the legality of
19 those sessions?

20

21 **PRESIDING OFFICER:** Oh, certainly.

22

1 **DC:** Did that have an impact on your personal view of
2 those sessions, sir?
3
4 **PRESIDING OFFICER:** An impact on my opinion? Well, I don't
5 know that I consciously formed an opinion when
6 you are just working on a project and pursuing
7 daily goals and in a coordination and staff
8 function, I don't know that you would----
9
10 **DC:** Perhaps I should take it backwards then, sir.
11
12 **PRESIDING OFFICER:** Okay.
13
14 **DC:** Have you formed an opinion about the legality of
15 these CSRTs?
16
17 **PRESIDING OFFICER:** No, they were not completed by the time
18 I left and I'm not even sure how they ultimately
19 were set up.
20
21 **DC:** And to this day, even your role as the Presiding
22 Officer, you are not aware of the function, the
23 specific functions of those boards?

1

2 **PRESIDING OFFICER:** No, other than their descriptive name,
3 it is a status board and my general understanding
4 is that those are provided on a periodic basis
5 but once I detached that was not a matter of
6 interest to me. I went on to new duties.

7

8 **DC:** Did you review or have any input in the 7 July
9 2004 memorandum from Mr. Mora regarding
10 interrogation techniques at Guantanamo?

11

12 **PRESIDING OFFICER:** What—give me the date, again?

13

14 **DC:** 7 July 2004, sir. I can have this marked as a
15 review exhibit.

16

17 **PRESIDING OFFICER:** I don't know what memo you are talking
18 about. If you have my bio the dates that I was
19 in the General Counsel's Office, I believe, were
20 from March 2003 to July 2004. I would have left
21 within the first couple of days of July, so if
22 that document---

23

1 **DC:** The reason I ask, sir, it's a 40-page document so
2 obviously it was not drafted on the day in
3 question but details, investigations, and
4 essentially the thought process of Mr. Mora
5 regarding techniques that have been reported to
6 him regarding improper interrogation techniques
7 at Guantanamo.

8

9 **PRESIDING OFFICER:** I'm not aware that I participated in
10 that but I would have to see it.

11

12 **DC:** Okay, sir. I will have this marked as Review
13 Exhibit next in order. I, unfortunately, do not
14 have a copy for the prosecution.

15

16 **PRESIDING OFFICER:** Well, Colonel, step back to the
17 microphone, please.

18

19 [The defense counsel did as directed.]

20

21 **PRESIDING OFFICER:** Why do you not have a copy and why is
22 it not marked review exhibit?

23

1 **DC:** Sir, I got a little bit sidetracked this morning
2 on some of the preparations I was doing for this
3 and I just didn't make copies of some of the
4 things I have.

5

6 **PRESIDING OFFICER:** Well.

7

8 **DC:** I can move on and come back to this, sir, after
9 the lunch break, if you would prefer.

10

11 **PRESIDING OFFICER:** As far back as December, you were
12 informed that voir dire would be conducted at the
13 initial session, were you not?

14

15 **DC:** Yes, sir.

16

17 **PRESIDING OFFICER:** And that's been the subject of
18 correspondence and discussions with you on
19 multiple occasions prior to today.

20 Is that correct?

21

22 **DC:** That's correct, sir.

23

1 **PRESIDING OFFICER:** And, in fact, at one point, you assured
2 me in correspondence that you would be prepared
3 to conduct voir dire very quickly during the
4 February term of these proceedings, is that
5 right?

6

7 **DC:** That's correct, sir.

8

9 **PRESIDING OFFICER:** And this morning you are telling me you
10 haven't even marked your exhibits?

11

12 **DC:** That's correct, sir.

13

14 **PRESIDING OFFICER:** Okay. Please move on.

15

16 **DC:** Yes, sir. I will return to this after the lunch
17 break then.

18

19 So you have no memory of this document, at all,
20 right now subject to having not seen it at this
21 point?

22

1 **PRESIDING OFFICER:** That's right. I mean, the date on the
2 document doesn't give me enough information to
3 tell whether I participated or what it said.

4

5 **DC:** Would that have been in your purview in your role
6 as the assistant in that office?

7

8 **PRESIDING OFFICER:** Drafting a memo like that?

9

10 **DC:** Or having input on the legal impact of the memo,
11 sir.

12

13 **PRESIDING OFFICER:** I'd rather doubt legal input. I may
14 have done formatting and editing after the
15 General Counsel drafted what he wanted and
16 forward it to somebody as a general matter.

17

18 **DC:** So was that generally the case on all matters?
19 That you provided no legal advise during the
20 time—that was not your role while you were
21 working with Mr. Mora?

22

1 **PRESIDING OFFICER:** No, that would be too broad a
2 generalization. I was Executive Assistant and
3 Special Counsel and on matters particularly that
4 involved the active duty Navy, particularly
5 matters under the purview of the Judge Advocate
6 General, I was asked my view because that is an
7 area of the law that the Civilian General
8 Counsel's Office generally does not do. An
9 analogy would be the General Counsel's Office
10 represents the business law firm of the Navy
11 while the Judge Advocate General represents the
12 operational law firm of the Navy.

13

14 **DC:** Was the segregation of those duties that sharp in
15 the sense that you would never have interacted in
16 an ongoing office investigation due to a matter
17 that might stray outside your otherwise normal
18 specialty role, then?

19

20 **PRESIDING OFFICER:** I'm sorry. Ask me that, again.

21

22 **DC:** Was your role so well defined that you would
23 never stray outside the lanes of that defining

1 tasks if there were, for instance, a large
2 project or investigation ongoing, would you have
3 never been consulted or spoken to or discussing
4 these matters?

5
6 **PRESIDING OFFICER:** Well, never and always are—I'll leave
7 it as I described it. My principal role as
8 Special Counsel was generally to provide legal
9 advice on those matters that were under the
10 active duty side as opposed to the business side.

11
12 **DC:** Okay, sir.

13
14 **PRESIDING OFFICER:** Could there be circumstances where the
15 two involve both issues? Theoretically, I
16 suppose, yes.

17
18 **DC:** [REDACTED]
19 [REDACTED]
20 [REDACTED]

21
22 **PRESIDING OFFICER:** [REDACTED]
23

1 DC: [REDACTED]
2
3 PRESIDING OFFICER: [REDACTED]
4
5 DC: [REDACTED]
6 [REDACTED]
7 [REDACTED]
8
9 PRESIDING OFFICER: [REDACTED]
10
11 DC: [REDACTED]
12 [REDACTED]
13
14 PRESIDING OFFICER: [REDACTED]
15
16 DC: [REDACTED]
17 [REDACTED]
18
19 PRESIDING OFFICER: [REDACTED]
20
21 DC: [REDACTED]
22
23 PRESIDING OFFICER: [REDACTED]

1

2 DC:

3

4

5 PRESIDING OFFICER:

6

7 DC: Have you had interactions with the General

8 Counsel?

9

10 PRESIDING OFFICER: Well, describe "interactions" have I

11 met him? Yes.

12

13 DC: Have you attended social functions with him?

14

15 PRESIDING OFFICER: I have not attended social functions

16 with him but in my role as Executive Assistant to

17 the General Counsel, if the General Counsel had

18 an event for the larger office of general

19 counsel, he also attended.

20

21 DC: So stepping away from when you were in the

22 General Counsel's Office, but since then, office

23 Christmas parties, you haven't socialized----

1

2 **PRESIDING OFFICER:** No.

3

4 **DC:** ----with him through [REDACTED] social
5 commitments, for instance?

6

7 **PRESIDING OFFICER:** No, in the six years that [REDACTED] has been

8 there, [REDACTED]

9 [REDACTED]

10 function" although no Christmas parties, probably
11 fewer than five times.

12

13 **DC:** And it would be safe to say that he's never been
14 to your home for a social event?

15

16 **PRESIDING OFFICER:** He has not.

17

18 **DC:** Do you socialize with other [REDACTED]

19 [REDACTED]

20

21 **PRESIDING OFFICER:** No.

22

1 **DC:** The Assistant Presiding Officer is Mr. Keith
2 Hodges, is that right, sir?

3

4 **PRESIDING OFFICER:** Yes.

5

6 **DC:** Are you familiar with his appointment letter that
7 was signed by Chief Presiding Officer Brownback?

8

9 **PRESIDING OFFICER:** Yes.

10

11 **DC:** And in that letter, which is in one of the POMs,
12 it defines what duties he is not permitted to
13 perform at the Federal Law Enforcement Training
14 Center, isn't that correct?

15

16 **PRESIDING OFFICER:** Well, I'll accept your premise.

17 What's the concern?

18

19 **DC:** Were you aware that Mr. Hodges has conducted
20 training during while he was at FLETC concerning
21 the Patriot Act and its—the result of the Patriot
22 Act being the result of September 11th, 2001 and
23 its impact on terrorism prosecutions?

1

2 **PRESIDING OFFICER:** I'm not aware of that.

3

4 **DC:** So you would not have been aware that if he had
5 did that, when that would have occurred? Whether
6 it was during his current tenure or before?

7

8 **PRESIDING OFFICER:** I told you, I'm not aware that he's
9 done it at all.

10

11 **DC:** Are you aware of the nature of what his jobs are
12 at the Department of Homeland Security?

13

14 **PRESIDING OFFICER:** I am not.

15

16 **DC:** Have you ever inquired as to what he does at his
17 office in the Department of Homeland Security?

18

19 **PRESIDING OFFICER:** No.

20

21 **DC:** Do you know where his office is physically
22 located, sir?

23

1 **PRESIDING OFFICER:** Not precisely.

2

3 **DC:** Do you know if he still works at the Department
4 of Homeland Security at the FLETC Center?

5

6 **PRESIDING OFFICER:** Why is that relevant to a potential
7 challenge for me where he works?

8

9 **DC:** Sir, if the clerk has a bias or something which
10 would be itself a challenge against the Presiding
11 Officer, that can be impugned to the Presiding
12 Officer if the clerk, or in this case, the
13 Assistant Presiding Officer, is not separated
14 from the proceedings.

15

16 **PRESIDING OFFICER:** I'm sorry. Say that again.

17

18 **DC:** In a normal situation, a clerk for a District
19 Court Judge, for instance—

20

21 **PRESIDING OFFICER:** Right.

22

1 **DC:** If there is a bias or something that would, if it
2 existed on the judge, would be sufficient cause
3 for challenge against the judge regarding his
4 partiality. The clerk's bias can be sufficient
5 to either separate the clerk from the process or
6 separate the judge from the process.

7
8 **PRESIDING OFFICER:** Well, how does my knowing where his
9 office is give rise to a bias on my part?

10
11 **DC:** Well, sir, it's a question that establishes the
12 information for the next question. Which is he
13 continues to work in his office physically
14 located at the Federal Law Enforcement Training
15 Center, isn't it, sir?

16
17 **PRESIDING OFFICER:** That may be.

18
19 **DC:** And this is a training center where he trains law
20 enforcement agents including CITF agents on law
21 enforcement tasks.

22

1 **PRESIDING OFFICER:** I'm not aware of who he teaches. I
2 haven't had any discussions with him about that.
3
4 **DC:** So he could speculate, we could entirely be
5 violating the provisions of the POM and you have
6 never spoken to him regarding what his duties and
7 tasks are at FLETC?
8
9 **PRESIDING OFFICER:** Let me tell you my relationship with
10 the Assistant to the Presiding Officers; he is
11 the Assistant to the Presiding Officers. That is
12 my sole contact with him. I call him on the
13 phone at a number. He calls me back. I email
14 him things. I meet him when he is here and
15 discuss things. I am uninformed and uninterested
16 in where he works. My understanding is that he
17 is essentially on leave from his normal civilian
18 job in order to perform these functions and that
19 his principal and sole occupation is to serve as
20 the Assistant to the Presiding Officer. That is
21 the sum substance of my knowledge about him and
22 his connection with Homeland Security.
23

1 **DC:** Okay, sir, it would be safe to say then that your
2 knowledge of what he has or hasn't taught in this
3 timeframe would be zero?

4

5 **PRESIDING OFFICER:** That is correct. I haven't had any
6 discussions with him about that because it is
7 simply not germane to his function.

8

9 **DC:** Sir, I understand your answer. Sir, the course
10 of your time as a military judge, well let me
11 back up. How long have you been a military
12 judge?

13

14 **PRESIDING OFFICER:** Slightly over 2 years.

15

16 **DC:** And you had never been a judge prior to this
17 term?

18

19 **PRESIDING OFFICER:** No.

20

21 **DC:** In your 2 years as a military judge have you had
22 the opportunity to have cases before you that
23 involved misconduct of--during a conflict, that

1 is, Soldiers, Sailors, Airmen, Marines, who are
2 in a combat situation who are being charged with
3 crimes?

4

5 **PRESIDING OFFICER:** None that I recall.

6

7 **DC:** You are stationed at Norfolk, as your central
8 office, is that right?

9

10 **PRESIDING OFFICER:** I am in the Central Circuit which
11 includes the Tide Water area West, including
12 Chicago, and we also serve in a support capacity
13 to Jacksonville and Washington D.C., so I travel
14 in all those areas and have offices in all those
15 areas.

16

17 **DC:** And Norfolk, being joint in nature, do you have--
18 have you had the opportunity to try courts-
19 martial for members not of the Navy?

20

21 **PRESIDING OFFICER:** Members not of the Department of the
22 Navy?

23

1 **DC:** Yes, sir.

2

3 **PRESIDING OFFICER:** No.

4

5 **DC:** Members of the Army or Marine Corps?

6

7 **PRESIDING OFFICER:** No.

8

9 **DC:** Okay, sir. How many contested cases would you
10 say you have had in that time?

11

12 **PRESIDING OFFICER:** In the last approximately 2 years?

13

14 **DC:** Yes, sir.

15

16 **PRESIDING OFFICER:** Eight to twelve.

17

18 **DC:** And how many of those would you say were judge
19 alone trials?

20

21 **PRESIDING OFFICER:** Two.

22

1 **DC:** I think I know the answer to this from your prior
2 question, but have any of your trials that you
3 have presided over had anything to do with
4 terrorism?

5

6 **PRESIDING OFFICER:** Well I don't know exactly what you mean
7 by, "to do with terrorism," but----

8

9 **DC:** Was someone charged with a terroristic act?

10

11 **PRESIDING OFFICER:** No. I will leave it at that and accept
12 your characterization and just answer it, no.

13

14 **DC:** And that is all I was seeking, sir. Have you
15 served as a prosecutor in your time in the Navy?

16

17 **PRESIDING OFFICER:** Yes, I have.

18

19 **DC:** And how long have you served, approximately,
20 during your various terms as a prosecutor?

21

22 **PRESIDING OFFICER:** Approximately 5 years.

23

1 **DC:** Was any of that time in a combat zone, sir?

2

3 **PRESIDING OFFICER:** No.

4

5 **DC:** Have you ever served in a combat zone?

6

7 **PRESIDING OFFICER:** Yes.

8

9 **DC:** Was it in a criminal capacity either as a defense
10 counsel, or chief of justice, or anything of that
11 nature?

12

13 **PRESIDING OFFICER:** Was my service done in a criminal
14 capacity?

15

16 **DC:** Yes, sir.

17

18 **PRESIDING OFFICER:** No. Would you like to rephrase that?

19

20 **DC:** Yes, sir. Did you have a criminal law related
21 job at that time?

22

1 **PRESIDING OFFICER:** I was the Staff Judge Advocate on board
2 the U.S.S. Theodore Roosevelt, so certainly I
3 assisted that Commanding Officer as a Convening
4 Authority in disciplinary actions.

5

6 **DC:** Were there courts-martial convened during that
7 time?

8

9 **PRESIDING OFFICER:** Yes.

10

11 **DC:** Did any of them involve misbehavior before the
12 enemy?

13

14 **PRESIDING OFFICER:** Not that I recall, no.

15

16 **DC:** Misconduct of a guard or sentinel?

17

18 **PRESIDING OFFICER:** Yes.

19

20 **DC:** Do you recall the facts or specifics of the
21 misconduct of a guard or sentinel?

22

1 **PRESIDING OFFICER:** I recall one young Sailor fell asleep
2 on watch, for example.

3

4 **DC:** Subject to questions regarding the memorandum
5 from--for the Inspector General from the time you
6 were in Mr. Mora's offices, sir, I have no other
7 questions.

8

9 **PRESIDING OFFICER:** Well would you like to ask some
10 questions about that?

11

12 **DC:** Well, sir, I think you would have to review it
13 first, obviously, because you said that absent
14 reviewing it you don't have any memory of it.

15

16 **PRESIDING OFFICER:** Well----

17

18 **DC:** And I only have probably 2 minutes of questions
19 regarding it, sir.

20

21 **PRESIDING OFFICER:** Have it marked and pass it up. I don't
22 want to waste any more time.

23

1 **DC:** Yes, sir.

2

3 **PRESIDING OFFICER:** In the future, Colonel, if you are not
4 prepared, we are moving on.

5

6 **DC:** I understand, sir.

7

8 **PRESIDING OFFICER:** I have what has been marked Review
9 Exhibit 59, which is a 22-page document dated
10 July, it appears to be July 7th, although it is
11 difficult to see. Part of the date appears
12 smudged. Is it your understanding that this is a
13 July 7th date, 2004?

14

15 **DC:** Yes, sir.

16

17 **PRESIDING OFFICER:** Very well. Let me take a minute to
18 look at this. Do you have a copy that you can
19 refer to in asking your questions?

20

21 **DC:** No, sir. I am afraid that is the only copy but I
22 don't need it for my questions.

23

1 **PRESIDING OFFICER:** Okay, I have reviewed Review Exhibit
2 59, Lieutenant Colonel Broyles, what are your
3 questions?

4
5 **DC:** Well I guess the first one, you have probably
6 answered, are you familiar with it, have you seen
7 it before?

8
9 **PRESIDING OFFICER:** I frankly don't recognize it. It is
10 quite long. I have reviewed some of the key
11 aspects that would ordinarily, if I were a
12 participant in drafting or editing, that I would
13 typically recall, such as formatting of
14 footnotes, topic headings; none of this really
15 looks familiar to me, so I will leave it at that.
16 It is unfamiliar to me and I don't recall having
17 seen it before.

18
19 **DC:** That really precludes any further questions on
20 that. Thank you.

21
22 **PRESIDING OFFICER:** Very well.

23

1 **DC:** I just have a couple more questions, sir, on Mr.
2 Hodges, and then I will be done, sir. You have
3 had 8-5 sessions in another case, that is al
4 Sharbi or the Barhoumi case, is that correct?

5
6 **PRESIDING OFFICER:** Yes.

7
8 **DC:** In one of the 8-5 sessions in the al Sharbi case,
9 were you aware that Mr. Hodges conducted an ex
10 parte fact finding mission to determine a matter
11 that was being currently before you for
12 resolution.

13
14 **PRESIDING OFFICER:** From your question, I am not aware of
15 what you are talking about.

16
17 **DC:** Were you aware that he had contacted the Bureau
18 of Prisons, someone that he had spoken to and
19 formed a relationship from his membership in the
20 Federal Law Enforcement Training Center and
21 questioned them regarding access to prisoners and
22 then presented that information at the 8-5
23 session?

1

2 **PRESIDING OFFICER:** In front of me?

3

4 **DC:** Yes, sir.

5

6 **PRESIDING OFFICER:** I am not sure what you are talking

7 about.

8

9 **DC:** So you don't recall that having occurred?

10

11 **PRESIDING OFFICER:** No.

12

13 **DC:** Okay, sir, thank you. I have nothing further.

14

15 **PRESIDING OFFICER:** Does the prosecution have any follow-up

16 questions?

17

18 **APROS::** No, sir.

19

20 **PRESIDING OFFICER:** Does either side have a challenge of

21 the Presiding Officer?

22

23 **APROS::** The prosecution does not, sir.

1

2 **PRESIDING OFFICER:** Lieutenant Colonel Broyles, do you have
3 a challenge?

4

5 **DC:** Yes, sir.

6

7 **PRESIDING OFFICER:** Very well, you may proceed.

8

9 **DC:** And again, sir, I would ask that I be given the
10 opportunity to do this in writing, give the
11 prosecution an opportunity to respond as well.
12 It delves into matters beyond that which was done
13 in voir dire today, matters that are a matter of
14 the record, review exhibits, and so forth, and I
15 believe it would be more appropriate for that to
16 be in writing. It would also give me time, of
17 course, to pursue the resolution of the ethics
18 problem which I find confronting me which would
19 minimize the active role I have taken thus far,
20 which is contrary to my own view of what the
21 ethics rules are.

22

1 **PRESIDING OFFICER:** Well I will let you work your role out
2 with your client. You were provided my
3 biography, I believe on or about 20th of January?

4

5 **DC:** That is correct, sir.

6

7 **PRESIDING OFFICER:** I provided you the supplemental
8 information around the 22nd of February?

9

10 **DC:** Yes, sir.

11

12 **PRESIDING OFFICER:** You were strongly encouraged to submit
13 written voir dire questions to me on the 23rd of
14 January. Is that correct?

15

16 **DC:** I believe that is correct, yes, sir.

17

18 **PRESIDING OFFICER:** Written voir dire was--well, let me
19 back up. On the 23rd of January, you indicated
20 that you would be prepared before the initial
21 session, then scheduled for February, to conduct
22 voir dire within 1 day.

23

1 **DC:** Yes, sir.

2

3 **PRESIDING OFFICER:** Is that accurate? The trial order for
4 today's session was published on the 1st of
5 April, which was approximately 3 weeks ago, which
6 included voir dire and challenges. Is that
7 accurate?

8

9 **DC:** Yes, sir, and at that time, I also requested then
10 the opportunity to delay the challenge portion of
11 the voir dire.

12

13 **PRESIDING OFFICER:** I understand, but that was not granted
14 at the time.

15

16 **DC:** Yes, I understand, sir.

17

18 **PRESIDING OFFICER:** It seems to me that you have had a
19 great deal of preparation time. How many times
20 have you conducted voir dire in your career?

21

22 **DC:** A few hundred, sir.

23

1 **PRESIDING OFFICER:** And how many times have you submitted
2 challenges in writing after a delay?

3

4 **DC:** Well, sir, I can't think of a single occasion
5 where I have a challenged a military judge, so
6 there would be--it would be to my challenges
7 against panel members, sir.

8

9 **PRESIDING OFFICER:** Well I have also participated in
10 hundreds, if not nearly a thousand cases, and I
11 am not aware of any circumstance under which
12 either side submitted a challenge after a delay
13 in order to consider matters of the record that
14 are beyond the voir dire or to draft a written
15 challenge. Do you have any authority that would
16 support your request for a written challenge as
17 opposed to issuing challenges in the traditional
18 fashion?

19

20 **DC:** No, sir. I am not asking that that be the case
21 necessarily, I am saying that in this particular
22 instance there are sufficient matters in the
23 review exhibits, there is sufficient case law

1 regarding these matters, that it is more
2 appropriate for this to be in the form of a
3 written motion than it is for me to conduct this
4 challenge here on my feet before this tribunal
5 now.

6
7 I also don't feel that it would impede any other
8 process of the court, so there is no impact on
9 any other parties, certainly the accused has no
10 objection to this process. Essentially, Your
11 Honor, I see that there is no basis to deny the
12 request because I have a good faith basis to
13 request that I be allowed to do this in writing.
14 I did request----

15
16 **PRESIDING OFFICER:** Well I am trying to pursue that because
17 my review of the record up to this point would
18 believe that you have a good faith basis for asking
19 for that. It seems to me that you have had ample
20 opportunity to be fully prepared to explore
21 issues on the record, in voir dire, and determine
22 if a challenge for cause exists.

1 **DC:** Sir, not all matters that are susceptible for a
2 challenge of cause are particularly appropriate
3 for voir dire. There are matters of the record
4 that----

5

6 **PRESIDING OFFICER:** Well have you had the record and access
7 to the record?

8

9 **DC:** Yes, sir.

10

11 **PRESIDING OFFICER:** So what is the delay for?

12

13 **DC:** Frankly, I believe this is more appropriate for a
14 legal motion than it is for a challenge in this
15 court. This is not the same as a challenge to a
16 juror, sir. This is a challenge to the Presiding
17 Officer, in a Commission. The sole figure that
18 is going to rule on the law in a process, which
19 is in flux, at best, it is the single most
20 important action that can be taken by the accused
21 to assure his fair trial, sir. I am asking for,
22 essentially, 1 week from Friday to submit my own
23 written motion on that matter, which would of

1 course necessitate a week for the prosecution to
2 respond, and since I know that we are having
3 another session, sir, where we would be
4 discussing motions; that's what my reasoning is,
5 sir.

6
7 **PRESIDING OFFICER:** Well I think what we are going to do
8 is, what I typically do is I allow counsel who
9 need time to get their thoughts together, to do
10 that. We need to adjourn for lunch shortly so
11 that your client, among other staff and
12 personnel, can be provided lunch. I will allow
13 you the lunch hour to get your thoughts together
14 and issue such challenge, if any, that you wish
15 to raise.

16
17 It is a quarter to 12. We will reopen the
18 Commission at 1330 and you may proceed with your
19 challenge, if you wish to make one.

20
21 **DC:** Okay, sir, it is my position that I would also be
22 forwarding this motion as a motion in writing
23 challenging you, irrespective of whether or not

1 we do this on the record here today. I believe
2 it is wasted duplicate effort in that instance,
3 but I will be prepared after lunch if that is
4 what you are ordering, sir, is to take my lunch
5 hour and instead prepare this, then that is what
6 I will do, sir.

7

8 **PRESIDING OFFICER:** That is up to you. I am telling you
9 that at 1330 you be prepared to issue a challenge
10 if you have one or to waive challenges if you
11 have none.

12

13 **DC:** I will have one, sir.

14

15 **PRESIDING OFFICER:** Very well. The Commission is in recess
16 until 1330.

17

18 *The Commission Hearing recessed at 1146, 25 April 2006.*

19 *The Commissions Hearing was called to order at 1341,*
20 *25 April 2006.*

21

22 **PRESIDING OFFICER:** This military Commission is called to
23 order.

1

2 **APROS:** All parties present when the Commissioned
3 recessed are again present. We note that the
4 accused remains absent from the proceedings, sir.

5

6 **PRESIDING OFFICER:** Thank you. Colonel Broyles, can you
7 bring the Commission up to date with respect to
8 why your client is absent at this session.

9

10 **DC:** Yes, sir. As with the last session, the accused
11 has voluntarily chosen to not participate in any
12 of these proceedings, again, based on his belief
13 that these proceedings are illegitimate in their
14 whole.

15

16 **PRESIDING OFFICER:** Have you had a chance prior to this
17 afternoon's proceedings to discuss this with your
18 client?

19

20 **DC:** Yes, sir.

21

22 **PRESIDING OFFICER:** And have you satisfied yourself that
23 his decision is an informed decision?

1

2 **DC:** Yes, sir.

3

4 **PRESIDING OFFICER:** And that it is his voluntary decision?

5

6 **DC:** Yes, sir.

7

8 **PRESIDING OFFICER:** Is there anything short of physical
9 force that would prompt him to attend the session
10 this afternoon?

11

12 **DC:** No, sir. I believe some level of force would be
13 required.

14

15 **PRESIDING OFFICER:** And do you request that I direct that
16 force to be used?

17

18 **DC:** No, sir.

19

20 **PRESIDING OFFICER:** Very well. I find that the accused
21 absence is voluntary based on representations of
22 counsel and the recent advisement of rights,

1 which I gave to him this morning. Thank you,
2 Colonel. You may be seated.

3

4 [The defense counsel did as directed.]

5

6 **PRESIDING OFFICER:** Prior to entertaining your challenge, I
7 would like to clarify one matter. You asked me
8 one question about a conference that I held in
9 another case and asked about some information
10 related to the Bureau of Prisons, which I had no
11 recollection of, so I reviewed my summary of that
12 conference which was filed as a review exhibit in
13 that case and I had marked as Review Exhibit 60
14 in this case. And there is no mention of Bureau
15 of Prisons information in that summary, which I
16 drafted. However, at sometime subsequent, I
17 received an email from Lieutenant Kuebler, who is
18 the detailed defense counsel in that case,
19 requesting in his paragraph five that I add to
20 the summary or have appended to the record the
21 fact that the "APO indicated that he had spoken
22 with employees at the Bureau of Prisons to
23 ascertain whether the Bureau of Prisons had any

1 procedures for dealing with situations such as
2 when an accused refuses to meet with counsel." I
3 told you this morning that I had no recollection
4 of that. I do not have any recollection of that.
5 I've confirmed in my mind that it does not appear
6 in my summary and I don't know whether that is
7 because I didn't recall even immediately
8 afterwards or because I didn't consider it
9 significant enough to put in, but in any event, I
10 continue to have no direct recollection of that.
11 And so with that clarification, I want to make it
12 clear the basis for my answer.

13
14 Based on that, are there any follow up questions
15 from the government?

16
17 **APROS:** No, sir.

18
19 **PRESIDING OFFICER:** Any follow up questions from the
20 defense?

21
22 **DC:** Yes, sir, really more of a clarification of what
23 you've just stated.

1

2 **PRESIDING OFFICER:** Yes.

3

4 **DC:** Are you then satisfied, as a matter of fact, that
5 event, as described by Lieutenant Kuebler,
6 occurred? And I ask that because I know you
7 don't have an independent recollection of it.

8

9 **PRESIDING OFFICER:** Right.

10

11 **DC:** So, but are you satisfied to the extent that you
12 feel would feel comfortable with me arguing that
13 was a fact that had been established in the
14 record?

15

16 **PRESIDING OFFICER:** I have no basis upon which to refute
17 that. So we will put it that way.

18

19 **DC:** Well, sir, because I---

20

21 **PRESIDING OFFICER:** I think it is a matter of record in
22 that case, and you certainly may refer to it as
23 such.

1

2 **DC:** Because we could always call Mr. Hodges as a
3 witness in this case to describe those activities
4 should that still be a question in your mind,
5 sir.

6

7 **PRESIDING OFFICER:** The only question in my mind is you
8 asked me about it. I had no recollection of it.
9 But your question was sufficiently specific that
10 I was concerned that I had not recalled
11 correctly, so I clarified my recollection. And
12 it is, in fact, correct. I have no recollection
13 of it now. I had no recollection of it at the
14 time or it would have appeared in the summary.
15 So, it's a matter beyond my cognition and it was
16 brought subsequently to the attention of the
17 record and to me through correspondence from
18 Lieutenant Kuebler. And all of that is a matter
19 of record.

20

21 **DC:** You may not know the answer to this, sir, but the
22 email from Lieutenant Kuebler was not a review

1 exhibit in the al Sharbi case, prior to today was
2 it, sir?

3

4 **PRESIDING OFFICER:** Oh, I don't know. Was it not? I mean,
5 it was sent to me. I called it up on my own
6 email.

7

8 **DC:** Well, I can proffer to the court that when I
9 looked yesterday, it was not a review exhibit in
10 the al Sharbi case.

11

12 **PRESIDING OFFICER:** Well, I've had it appended to this case
13 as a review exhibit since I believe it was
14 pertinent to the question.

15

16 **DC:** Sir, I have no further questions.

17

18 **PRESIDING OFFICER:** Very well. Do you have any challenges
19 of the Presiding Officer?

20

21 **DC:** Yes, sir, I do.

22

23 **PRESIDING OFFICER:** Very well. You may proceed.

1

2 **DC:** Sir, I am relying on the standard announced in
3 Review Exhibit 62, formally Review Exhibit 153
4 from the al Bahlul case. It is the appointing
5 authority's decision in a challenge for cause in
6 that case announcing the appointing authority's
7 standard for deciding challenges for cause.
8 Copies have been provided to the prosecution and
9 made a review exhibit in this case.

10

11 **PRESIDING OFFICER:** Thank you.

12

13 **DC:** Sir, essentially, the challenge breaks down into
14 two distinct areas. First, I believe that you
15 have given up your impartial role and have
16 assumed a role, which is partial to and
17 advocating on behalf of the United States
18 Government, the prosecution in this case. And
19 that is primarily the result of prior actions
20 that you took in this case that are review
21 exhibits in this court.

22

1 First, on 21 December 2005, you adopted the POMs
2 in their whole that had existed prior to your
3 becoming a Presiding Officer. At that same time
4 when you accepted those, Presiding Officer
5 Memorandum that was 21 December, that's Review
6 Exhibit 7, you set a 5 January deadline for the
7 prosecution to request protective orders. On 23
8 January, in Review Exhibits 18, 19, and 20, you
9 *sua sponte* issued protective orders without a
10 prosecution request and without complying with
11 POM 9-1, which you had yourself adopted on 21
12 December.

13
14 This is important in how it shows bias, sir,
15 because the protective orders that you had
16 adopted were drafted by the prosecution without
17 any input from the defense and simply taken from
18 another case and placed without regard for what
19 POM 9-1 requires for a protective order.

20
21 **PRESIDING OFFICER:** Excuse me. Do you have evidence of
22 what I considered when you are saying "without
23 regard?"

1

2 **DC:** Sir, my "without regard" is based on the fact
3 that it is a word-for-word example from a prior
4 prosecution----

5

6 **PRESIDING OFFICER:** Do you know what I considered?

7

8 **DC:** No, sir, you never made that part of the record,
9 sir.

10

11 **PRESIDING OFFICER:** Then, upon what do you base your
12 assumption that it is without regard?

13

14 **DC:** The fact that there was no justification given by
15 yourself despite requests for that information,
16 the fact that it did not follow POM 9-1
17 standards, which set forth how you will consider
18 matters in determining.

19

20 **PRESIDING OFFICER:** Well, let's stick to the facts without
21 characterizing my motives or my decision making
22 if it's not of record.

23

1 **DC:** Okay, sir.

2

3 **PRESIDING OFFICER:** You certainly may argue the facts. And
4 the fact may be that there's no rational given
5 but I think it's a long leap to say that I have
6 given no regard for matters. You may proceed.

7

8 **DC:** Yes, sir. Without any indication of what matters
9 were relied on, you issued the word-for-word
10 protective orders that the prosecution had
11 drafted. Again, sir, without any input from the
12 defense, without a hearing to determine if any
13 protective order was necessary, without a request
14 from the prosecution, without a detail from the
15 prosecution as to what matters needed to be
16 protected, if any, and the breadth of these
17 protective orders were such that I was unable to
18 show any documentary evidence to the accused.

19

20 **PRESIDING OFFICER:** Is that a matter of record?

21

22 **DC:** Yes, sir. This has been—I don't have the review
23 exhibit of the email traffic where that has gone

1 on but, sir, that was the subject of an 8-5
2 meeting with yourself in Washington, D.C.
3 regarding my inability to form an attorney-client
4 relationship and the discussion of my inability
5 to show documents to the accused.

6

7 **PRESIDING OFFICER:** Well, I think the record will speak for
8 itself. So you may continue.

9

10 **DC:** Yes, sir. But in any event, 9-1 has the
11 following steps that are required. The first
12 paragraph about the issue is when counsel agreed
13 to a protective order. And certainly nothing on
14 the record shows that that's the case and
15 subsequent review exhibits display with certainty
16 that there was no agreement among counsel. So
17 there was no counsel agreeing to a protective
18 order.

19

20 Paragraph four, when counsel do not agree to a
21 protective order, says "if a party requests a
22 protective order and the opposing counsel does
23 not agree with the necessity or its wording, the

1 requesting counsel shall present the requested
2 order as an email attachment to the Presiding
3 Officer or it shall be styled in the following
4 fashion. The nature of the information, sought
5 to be protected, when such information is in
6 document form should be attached, why the order
7 is necessary, efforts to obtain the agreement of
8 opposing counsel." None of those steps were
9 followed, sir.

10
11 The protective orders in this case are an
12 important aspect of every facet of the case. And
13 the prosecution has a burden or actually any
14 party has a burden, who seeks a protective order,
15 has a burden to show why the protective order is
16 necessary. And I would argue from the
17 substantial—from the whole reading of the POMs
18 and the MCIs and the MCOs that protective orders
19 have to be narrowly tailored to limit the
20 protective order, not give expansive protective
21 orders. But the import of these protective
22 orders was to give the prosecution, in wholesale,
23 what they had not bothered to ask for. They had

1 blown your deadlines, sir, of 5 January, without
2 comment. And on 23 January, essentially, sir,
3 you relieved the government of the burden of
4 doing its job and you did it for them by issuing
5 a *sua sponte* protective order.

6
7 And, sir, there's nothing on the record, there's
8 no regulations, there's nothing to suggest that a
9 Presiding Officer has the authority to issue a
10 *sua sponte* protective order. But the import of
11 that is, sir, that shows, again, that is not an
12 impartial act, that is a partial act.

13
14 The next event, sir, was you issued a discovery
15 order on 21 December, that's Review Exhibit 8.
16 Part of the discovery order was that the
17 prosecution was required to provide a list of
18 their witnesses and the synopsis of those
19 witnesses. And the synopsis was very clearly
20 defined, both in the order and in reference to
21 POM 10-1, which contained not only examples, but
22 specific language of what a synopsis was.

1 The prosecution did not provide a synopsis. This
2 issue was raised to the Presiding Officer. The
3 prosecution provided a reference to materials the
4 witnesses might testify about. And, if I could
5 quote, sir?

6

7 **PRESIDING OFFICER:** You may.

8

9 **DC:** This is a CID agent, "witness will testify
10 regarding statements—I'm sorry, sir. I was
11 reading from the wrong one. "Witness will
12 testify consistent with the statements this agent
13 present for that had been or will be provided to
14 the defense." And I note that, as of today, not
15 all of those statements have been provided to the
16 defense. So, the government didn't comply with
17 that portion of the discovery order. We haven't
18 really gave any of that yet, sir, I'm not trying
19 to pre-litigate that, however, that response was
20 given substantially, I think it was 40 percent of
21 the time, as a response to the synopsis of
22 testimony, the identical words. Without
23 reference to what the statements were, where the

1 statements were located in the record, just that
2 statement. Even in instances where the
3 statements have not been provided.

4
5 The prosecution, in discussing this with you at
6 an 8-5 and myself, sir, said that they had done
7 all they were going to do and that they did not
8 intend to give any more information that that was
9 good enough despite the fact that it clearly did
10 not comply with your orders, sir. And in your
11 response to that, sir, was two weeks later
12 instead of holding the feet of the government to
13 the fire and making them comply with your order,
14 you changed the order to comply with their
15 behavior. And you issued the order change on 3
16 March at Review Exhibit 39. And if I could grab
17 Review Exhibit 39, in pertinent part reads, "If
18 any matter that has been disclosed to an opposing
19 party contains a complete synopsis of the
20 testimony, the document is identified by Bates
21 stamp number or otherwise and the location of
22 the----

1 **Presiding Officer:** I'm sorry, back up and say that again.

2

3 **DC:** I'm sorry, sir. I'm just reading from the
4 modified protective order.

5

6 **Presiding Officer:** Yes.

7

8 **DC:** "If any matter that has been disclosed to an
9 opposing party contains a complete synopsis of a
10 witness's testimony."

11

12 **Presiding Officer:** Okay, contains a complete synopsis.

13

14 **DC:** Yes, sir.

15

16 **Presiding Officer:** Okay.

17

18 **DC:** "The document is identified by Bates stamp number
19 or otherwise and the location of the document is
20 reasonably described, no additional synopsis is
21 required to be disclosed."

22

1 And, sir, I didn't object to this change when
2 this was sent forward. But, sir, again, the
3 prosecution hadn't complied and rather than make
4 them comply, you changed the rules so what they
5 had done was sufficient.

6

7 **Presiding Officer:** But you did say that you didn't object
8 to that.

9

10 **DC:** I didn't object to the change, no, sir.

11

12 **Presiding Officer:** Okay, thank you.

13

14 **DC:** My objection is----

15

16 **Presiding Officer:** You may proceed.

17

18 **DC:** My objection is to not only the appearance, but
19 the actual partiality that it shows, sir. You
20 have, again, taken the role of the prosecution,
21 except with the additional authority of the
22 Presiding Officer, and shaped the rules to fit
23 their conduct. You relieved them of a

1 substantial burden they had to have, robbing the
2 accused of substantial information, regarding how
3 he was to defend himself. Sir, those acts were
4 acts inappropriate to an impartial officer and
5 indicated partiality towards the prosecution.
6 And there's been no such acts relating to defense
7 burdens. No relief of defense burdens, unless
8 they have been specifically requested.

9
10 And finally, sir, a third matter is, well, it is
11 sort of a combination matter, sir. It's sort of
12 three and four. One, there's an appearance
13 problem, sir. On the one hand, [REDACTED] works
14 [REDACTED]

15 And on its face, it's a relatively simple, a
16 relatively innocent factor. Combined with the
17 fact that your Assistant Presiding Officer
18 teaches Air Force Criminal Investigative Agents.
19 He teaches Federal Law Enforcement Agents,
20 including two military investigating agencies
21 that make up part of the Criminal Investigative
22 Task Force, which is substantially all of the
23 witnesses that the government has in these cases.

1
2 So between [REDACTED] having a very close
3 professional relationship with [REDACTED] where things
4 are embarrassing to [REDACTED] could be perceived as
5 embarrassing [REDACTED] so that if, for
6 instance, the findings of this court were that
7 [REDACTED] engaged in unethical, excessive behavior,
8 engaged in torture or things of that nature which
9 were detrimental to [REDACTED] reputation that would
10 be an implied reputation problem [REDACTED]
11

12 Additionally, sir, with having your Assistant
13 Presiding Officer, the closest person in your
14 process, according to the documents, who provides
15 you adjudicative advise, adjudicative advice
16 that's a pretty close relationship. He teaches
17 law enforcement agents. And he continues to
18 teach law enforcement agents while he's been the
19 Assistant to the Presiding Officer. The review
20 exhibit that I offered at 64 reflects at the
21 Sixth Annual Leadership Conference there was
22 training on the Patriot Act, there was training
23 on FBI counter terrorism.

1

2 **Presiding Officer:** And who did that training?

3

4 **DC:** The counter terrorism was Amy Jo Lyons.

5

6 **Presiding Officer:** Okay, and why is that relevant?

7

8 **DC:** Because the next day the person that was there

9 was Keith Hodges.

10

11 **Presiding Officer:** Well what do you mean by, "there"?

12

13 **DC:** The law of----

14

15 **Presiding Officer:** All right, now let's be precise,

16 please.

17

18 **DC:** Yes, sir.

19

20 **Presiding Officer:** Back up. You said there was training

21 at this leadership conference?

22

23 **DC:** Yes, sir.

1

2 **Presiding Officer:** And are you talking about training that
3 Mr. Hodges presented?

4

5 **DC:** No, sir. I was getting to what he presented. He
6 was present at the conference, which detailed
7 this sort of training and----

8

9 **Presiding Officer:** And the date of the conference is what?

10

11 **DC:** June 13th through 17, 2005. And his training was
12 2:30 to 3:30 pm on the 15th of June, the law of
13 installing and monitoring tracking devices,
14 handling digital photographs for use in criminal
15 trials.

16

17 Now that is partially important because you said
18 that you weren't aware that he was still even
19 instructing with FLETC and it very clearly is
20 true that he is, and sir, if you look at the
21 review exhibits, there is a plethora of emails
22 from Keith Hodges. He is the voice of the
23 Presiding Officer, that is his job. Those emails

1 all come from the Department of Homeland
2 Security, at DHS; he works everyday in the office
3 that does train on counter terrorism, that does
4 train on the Patriot Act, and the fact that he
5 may not personally do that, sir, or he may do
6 that, I don't know, sir. All I know for sure,
7 sir, is that he has taught on the Patriot Act, I
8 just don't know when.

9
10 I have presented as Review Exhibit number 65, the
11 43-page presentation Keith Hodges presented on
12 the Patriot Act.

13

14 **Presiding Officer:** When was that done?

15

16 **DC:** I have no idea, sir.

17

18 **Presiding Officer:** Why is it in the record?

19

20 **DC:** Because, sir----

21

22 **Presiding Officer:** If you don't know when it was done, how
23 does that become relevant here?

1

2 **DC:** Sir, the appearance of impropriety of having a
3 law enforcement----

4

5 **Presiding Officer:** Well it seems to me that if you are
6 putting in the record, you are creating the
7 appearance. If you can't identify where that
8 document came from or when it was published.

9

10 **DC:** Oh, I can identify where it came from, sir. It
11 was----

12

13 **Presiding Officer:** When was it published?

14

15 **DC:** I don't know when it was published, sir. It is
16 available on his website and this is--give me 1
17 second, sir. I understand where you are going
18 and I can connect that for you, sir.

19

20 **Presiding Officer:** Okay.

21

22 **DC:** It is on the website attributed to Keith Hodges
23 that he links to and says, "materials available"

1 and it is available at his website now. I
2 downloaded that on to my personal computer 3
3 weeks ago, so he is still associated with it, he
4 still links himself to it, and sir, according to
5 the POM that appointed him in the first place, he
6 can't engage in that behavior.

7

8 **Presiding Officer:** What behavior are you talking about?

9

10 **DC:** One moment, sir.

11

12 **Presiding Officer:** You are referring to things that are on
13 the website that you don't know when they were
14 published.

15

16 **DC:** The prescribed behavior is, "except as approved
17 in advance in writing by the Presiding Officer,
18 Mr. Hodges is not permitted to perform any duties
19 for the Department of Homeland Security that
20 involve advice to law enforcement concerning an
21 active case; advise on how to detect,
22 investigate, or prosecute alleged acts of
23 terrorism or violations of international law; or

1 any other matter that would create a perception
2 in the minds of a reasonable person that the
3 assistant's home agency, Department of Homeland
4 Security, has any pertinent information processed
5 through the actions of the assistant."
6

7 **Presiding Officer:** Okay. Well, let's go back to your
8 assertion, then. You've referred to a large
9 document but you don't know when it was
10 published, so you don't know if it was after he
11 was appointed or before he was appointed, and you
12 don't know whether he had permission to do it or
13 not.
14

15 **DC:** Yes, sir.
16

17 **Presiding Officer:** Is that all correct?
18

19 **DC:** That's correct, sir.
20

21 **Presiding Officer:** And that's the basis for your
22 assertion, nevertheless?
23

1 **DC:** That's one of the basis, but, sir, you, sir, have
2 an obligation to know that information. A
3 Presiding Officer has an obligation to know the
4 activities of his assistant. Federal Law is very
5 clear on that. The judicial canons are very
6 clear on that.

7

8 **Presiding Officer:** Well, pardon me for interrupting again,
9 but you don't know the basis for it.

10

11 **DC:** Excuse me, sir.

12

13 **Presiding Officer:** You are unable to present, as a matter
14 of record, the basis for that. You just said you
15 don't know when it was published.

16

17 **DC:** That's correct, sir.

18

19 **Presiding Officer:** If it was published prior to when he
20 was appointed, why is that of concern to me?

21

1 **DC:** Sir, he still associates himself with that. The
2 whole point of the POM was to prevent that
3 appearance of impropriety.
4
5 **Presiding Officer:** Well, wait a minute. You said you
6 pulled it down off a website.
7
8 **DC:** His website. Keith Hodges' website, sir. That's
9 what I said. It is attributed to him, it his
10 matters that you can go find his documents.
11
12 **Presiding Officer:** Well now you are discussing matters
13 that are not of record.
14
15 **DC:** Well no, sir, that is not true.
16
17 **Presiding Officer:** There is no way that----
18
19 **DC:** It is on the record, sir.
20
21 **Presiding Officer:** Show me where it is?
22

1 **DC:** If you will look at Review Exhibit 65, the first
2 page, it gives the website location of where the
3 documents are found.

4

5 **Presiding Officer:** Do you know what, "IACP" is? I don't.

6

7 **DC:** It is a web address, sir.

8

9 **Presiding Officer:** Does it stand for something?

10

11 **DC:** I don't know, sir. I probably knew when I looked
12 it up because it is related to another website,
13 sir.

14

15 **Presiding Officer:** Well I think I made it clear in my
16 answers to your questions that certainly Mr.
17 Hodges is employed by DHS and is essentially on a
18 leave of absence in order to attend to these
19 duties.

20

21 **DC:** Well, sir----

22

1 **Presiding Officer:** I am a bit puzzled why you would offer
2 something that you are unable to verify when it
3 was authored of published.

4

5 **DC:** But, sir, it is clear from the other exhibit that
6 I placed on the record that he is not on a leave
7 of absence, that he is continuing to teach
8 courses.

9

10 **Presiding Officer:** Well, no, what you offered was an
11 example of teaching. Do you know whether he had
12 permission to do that, as is required by the POM?

13

14 **DC:** No, sir, I do not.

15

16 **Presiding Officer:** Okay, so you are speculating on that?

17

18 **DC:** Yes, sir.

19

20 **Presiding Officer:** Okay, you may proceed. I have got the
21 basis of what you are saying.

22

1 **DC:** Sir, I am now going to point to the Model Code of
2 Judicial Conduct, canon 3(c), paragraph 2, a
3 judge shall require staff, court officials, and
4 others subject to the judge's direction and
5 control to observe the standards of fidelity and
6 diligence that apply to the judge and to refrain
7 from manifesting bias or prejudice in the
8 performance of their official duties. Sir, you
9 indicated that you had neither knowledge of or
10 interest in what activities Mr. Hodges was
11 involved in. That is inappropriate given that
12 judicial canon and the proscriptions on Mr.
13 Hodges work, which frankly, sir, since he sits in
14 that office, that same office where he did all
15 that proscribed work, that same office where
16 other people are now doing that work around him,
17 that you would not inquire what the nature of his
18 duties were. Sir, you're required to know that.

19

20 **Presiding Officer:** The nature of what duties, as APO?

21

22 **DC:** No, sir. The nature of what he's doing at FLETC,
23 if anything. Perhaps, you're right, sir.

1 Perhaps the answer will be, "I don't do anything
2 there. I just use the office space." I think
3 the record demonstrates that that's not, at
4 least, wholly true; but, again, sir, there's an
5 obligation there for you to actually know the--
6 that information, and that certainly creates an
7 appearance of impropriety for the closest person
8 to the Presiding Officer to be a Federal Law
9 Enforcement Training Officer.

10
11 That, combined with your other actions which show
12 actual partiality, sir, I believe you have to
13 recuse yourself from this case.

14
15 That's all, sir.

16
17 **Presiding Officer:** Thank you. Do you have any other basis
18 upon which to base a challenge?

19
20 **DC:** No, sir. I do have some case law if I'd--if
21 you'd like me to provide you with the case law
22 regarding the clerk's activities and its impact
23 on a judge.

1

2 **Presiding Officer:** No. First I want to know if there are
3 any other basis upon which you would like to
4 challenge the Presiding Officer.

5

6 **DC:** No, sir.

7

8 **Presiding Officer:** Thank you. Does the prosecution wish
9 to be heard?

10

11 **APROS:** Yes, sir.

12

13 **Presiding Officer:** Very well. You may proceed.

14

15 **APROS:** Just briefly, sir. As you well know, the
16 standard for challenges for cause against a
17 member of the Commission is fairly limited as set
18 out in the Appointing Authority decision. It's
19 mostly an actual bias standard with some very
20 limited instances of implied bias.

21

22 None of the evidence brought forward in voir dire
23 or during the course of the review exhibits being

1 compiled in this case have met that standard
2 demonstrating that you have any actual bias in
3 this case or that there is any implied bias in
4 this case that would meet that standard.

5
6 With respect to the allegations that you've
7 abandoned your judicial role with respect to the
8 protective orders, if you were to look at POM 9-
9 1, which is--what was cited by the defense
10 counsel, that POM addresses methods by which
11 counsel may obtain protective orders. Obviously,
12 as the Presiding Officer, you have an obligation
13 to maintain decorum and maintain order in these
14 proceedings. The issuance of protective orders,
15 under that authority, is obviously appropriate
16 and you wouldn't be required to abide by POM 9-1.

17
18 With respect to the allegation that the
19 prosecution didn't provide a request for
20 protective orders by 5 January as required,
21 Review Exhibit 10, and I'm looking at I believe
22 it's page 2 of 2 paragraph 5, no later than 5
23 January--or excuse me, paragraph 6, no later than

1 5 January 2006, the parties will provide the
2 Presiding Officer, opposing counsel, and me a
3 copy of all protective orders issued by any
4 authority that they believe have been issued and
5 remain in effect. Then you go on to say that any
6 party wishing to request a protective order must
7 comply with PROM 9-1, as appropriate. So you're
8 issuance of protective orders, in this case,
9 obviously is well within your authority and does
10 not constitute an abandonment of your judicial
11 role.

12
13 With regard to the allegation that the discovery-
14 the modification to PO 2, the discovery order,
15 constituted some sort of abandonment of your
16 judicial role, once again, the second paragraph
17 of that order says, "If either party objects to
18 this modification, they shall file a motion in
19 accordance with POM 4-3 not later than 10 March
20 2006." The prosecution is not aware of any
21 motion being filed. In accordance with that, to
22 challenge that order, I believe, Colonel Broyles
23 indicated that he did not challenge that order.

1 All this means, essentially, sir, is that you're
2 acting in accordance with your duties as the
3 Presiding Officer giving both parties the
4 opportunity to file motions as appropriate.
5 There's no abandonment of your judicial role in
6 these proceedings.

7
8 With regard to the appearance arguments, there's
9 very little facts on the record with regard to
10 those. You aren't intimately involved with Mr.
11 Hodges' outside employment. You utilize him as
12 appropriate as an assistant to the Presiding
13 Officer, and you've indicated that on the record.
14 The allegations of the defense that you are both
15 directly conflicted or that there's an appearance
16 of a conflict are simply not born out by the
17 record. With regard to any challenges to
18 discovery, the United States will obviously brief
19 that if a motion is filed in accordance with POM
20 4-3 at an appropriate time. We would not concur
21 with the defense's challenge and object to it.

22
23 Thank you.

1

2 **Presiding Officer:** Thank you. Well, I find that the
3 Presiding Officer has a responsibility pursuant
4 to MCO 1 as well as the President's Military
5 Order to take care that protected information, as
6 well as classified information and classifiable
7 information, be protected; and it was with that
8 independent responsibility and authority that I
9 issued the protective orders. I find that POM 9-
10 1 does apply to counsel as the method by which
11 they may apply for or request amendments to
12 protective orders.

13

14 With respect to the discovery orders, the record
15 reflects very clearly a long litany of
16 correspondence between and amongst the parties
17 and between the Presiding Officer and counsel for
18 both sides with respect to discovery, including
19 multiple incidents of guidance to the defense
20 counsel that if he objected or needed relief from
21 discovery, he is to file a motion under POM 4-3.

22

1 Beginning in December the 21st with the initial
2 instructions following a conference call with the
3 Assistant to the Presiding Officer which is RE 11
4 including the trial order of 23 January regarding
5 February term which is RE 17 how to preserve his
6 objections RE 21 responses to various of his e-
7 mail attempts to use e-mail as a substantive way
8 to raise objections required by motion under POM
9 4-3, numbered REs 22, 23, 24, 25, 26, 27, 31, 32,
10 as well as the 8-5 conference that has been
11 referred to which is at RE 35 and there has been
12 no motion.

13
14 I also find that there is no actual conflict with
15 respect to my duties and those of [REDACTED]

16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23

1 If find that the appearance, argued by counsel,
2 with respect to the APO is based upon speculation
3 and is not supported by the record at this point.

4

5 I will append my complete findings to the record
6 at a later point, but I find at this point that
7 there is no actual nor is there even an
8 appearance of conflict which would require me to
9 recuse myself, and your challenges are denied. I
10 find that I am qualified to serve on this
11 Military Commission as Presiding Officer.

12

13 All personnel have the requisite qualifications
14 and all required to be sworn have been sworn.

15

16 Defense Counsel, have you and your client
17 previously been provided a copy of the charges in
18 this case?

19

20 **DC:** Yes, sir. Both in Arabic and in English.

21

22 **Presiding Officer:** Thank you. The prosecutor will now
23 announce the general nature of the charges.

1

2 **APROS:** The general nature of the charges, in this case,
3 are conspiracy to attack civilians, conspiracy to
4 attack civilian objects, conspiracy to commit
5 murder by an unprivileged belligerent, conspiracy
6 to destroy property by an unprivileged
7 belligerent, conspiracy to commit the offense of
8 terrorism.

9

10 **Presiding Officer:** Does either party wish the charges to
11 be read?

12

13 **APROS:** The prosecution does not, sir.

14

15 **DC:** I can't in good faith waive the reading, sir.

16

17 **Presiding Officer:** Very well. Please read the charges.

18

19 **APROS:** Jurisdiction for this Military Commission is
20 based on the President's determination of July
21 6th, 2004 that Jabran Said Bin al Qahtani (a/k/a/
22 Salam al Farsi a/k/a Hateb a/k/a Jabran Qahtan
23 a/k/a/ Saad Wazar Hatib Jabran a/k/a/ Jabran Saad

1 Wazar Sulayman a/k/a Jabran Wazar) is subject to
2 his Military Order of November 13, 2001.

3
4 The charged conduct alleged against al Qahtani is
5 triable by a military commission.

6
7 Al Qaida ("the Base"), was founded by Usama bin
8 Laden and others in or about 1989 for the purpose
9 of opposing certain governments and officials
10 with force and violence.

11
12 Usama bin Laden is recognized as the emir (prince
13 or leader) of al Qaida.

14
15 A purpose or goal of al Qaida, as stated by Usama
16 bin Laden and other al Qaida leaders, is to
17 support violent attacks against the property and
18 nationals (both military and civilian) of the
19 United States and other countries for the purpose
20 of, inter alia, forcing the United States to
21 withdraw its forces from the Arabian Peninsula
22 and in retaliation for U.S. support of Israel.

1 Al Qaida operations and activities are directed
2 by a shura (consultation) council composed of
3 committees, including: political committee;
4 military committee; security committee; finance
5 committee; media committee; and religious/legal
6 committee.

7
8 Between 1989 and 2001, al Qaida established
9 training camps, guest houses, and business
10 operations in Afghanistan, Pakistan, and other
11 countries for the purpose of training and
12 supporting violent attacks against property and
13 nationals (both military and civilian) of the
14 United States and other countries.

15
16 In 1992 and 1993, al Qaida supported violent
17 opposition of U.S. property and nationals by,
18 among other things, transporting personnel,
19 weapons, explosives, and ammunition to Yemen,
20 Saudi Arabia, Somalia, and other countries.

21
22 In August 1996, Usama bin Laden issued a public
23 "Declaration of Jihad Against the Americans," in

1 which he called for the murder of U.S. military
2 personnel serving on the Arabian peninsula.

3
4 In February 1998, Usama bin Laden, Ayman al
5 Zawahiri, and others, under the banner of
6 "International Islamic Front for Fighting Jews
7 and Crusaders," issued a fatwa (purported
8 religious ruling) requiring all Muslims able to
9 do so to kill Americans, whether civilian or
10 military, anywhere they can be found and to
11 "plunder their money."

12
13 On or about May 29, 1998, Usama bin Laden issued
14 a statement entitled "The Nuclear Bomb of Islam,"
15 under the banner of the "International Islamic
16 Front for Fighting Jews and Crusaders," in which
17 he stated that "it is the duty of Muslims to
18 prepare as much force as possible to terrorize
19 the enemies of God."

20
21 Since 1989 members and associates of al Qaida,
22 known and unknown, have carried out numerous
23 terrorist attacks, including, but not limited to:

1 the attacks against the American Embassies in
2 Kenya and Tanzania in August 1998; the attack
3 against the U.S.S. COLE in October 2000; and the
4 attacks on the United States on September 11,
5 2001.

6
7 Sufyian Barhoumi, Jabran Said bin al Qahtani, and
8 Ghassan al Sharbi, in the United States,
9 Afghanistan, Pakistan, and other countries, from
10 on or about January 1996 to on or about March
11 2002, willfully and knowingly joined an
12 enterprise of persons who shared a common
13 criminal purpose and conspired and agreed with
14 Usama bin Laden (a/k/a Abu Abdullah), Saif al
15 Adel, Dr. Ayman al Zawahiri (a/k/a "the Doctor"),
16 Muhammad Atef (a/k/a Abu Hafs al Masri), Zayn al
17 Abidin Muhammad Husayn (a/k/a/ Abu Zubayda,
18 hereinafter "Abu Zubayda"), Binyam Muhammad, Noor
19 al Deen, Akrama al Sudani and other members and
20 associates of the al Qaida organization, known
21 and unknown, to commit the following offenses
22 triable by military commission: attacking
23 civilians; attacking civilian objects; murder by

1 an unprivileged belligerent; destruction of
2 property by an unprivileged belligerent; and
3 terrorism.

4
5 In furtherance of this enterprise and conspiracy,
6 al Sharbi, Barhoumi, al Qahtani, Abu Zubayda,
7 Binyam Muhammad, Noor al Deen, Akrama al Sudani,
8 and other members or associates of al Qaida
9 committed the following overt acts:

10
11 In 1998 Barhoumi, an Algerian citizen, attended
12 the electronics and explosives course at Khalden
13 Camp in Afghanistan, an al Qaida-affiliated
14 training camp, where he received training in
15 constructing and dismantling electronically-
16 controlled explosives.

17
18 After completing his training, Barhoumi became an
19 explosives trainer for al Qaida, training members
20 of al Qaida on electronically-controlled
21 explosives at remote locations.
22

1 In or about August 2000, al Sharbi, a Saudi
2 citizen and Electrical engineering graduate of
3 Embry Riddle University, in Prescott, Arizona,
4 departed the United States in search of terrorist
5 training in Afghanistan.

6
7 In July 2001, Muhammad Atef (a/k/a/ Abu Hafs al
8 Masri), the head of al Qaida's military committee
9 and al Qaida's military commander, wrote a letter
10 to Abu Muhammad, the emir of al Qaida's al Farouq
11 Camp, asking him to select two "brothers" from
12 the camp to receive electronically-controlled
13 explosives training in Pakistan, for the purpose
14 of establishing a new and independent section of
15 the military committee.

16
17 In July 2001, al Sharbi attended the al Qaida-run
18 al Farouq training camp, where he was first
19 introduced to Usama bin Laden. At al Farouq, al
20 Sharbi's training included, inter alia, physical
21 training, military tactics, weapons instruction,
22 and firing on a variety of individual and crew-
23 served weapons.

1
2 During July and August 2001, al Sharbi stood
3 watch with loaded weapons at al Farouq at times
4 when Usama bin Laden visited the camp.

5
6 From July 2001 to September 13, 2001, al Sharbi
7 provided English translation for another camp
8 attendee's military training at al Farouq, to
9 include translating the attendee's personal bayat
10 ("oath of allegiance") to Usama bin Laden.

11
12 On or about September 13, 2001, anticipating a
13 military response to al Qaida's attacks on the
14 United States of September 11, 2001, al Sharbi
15 and the remaining trainees were ordered to
16 evacuate al Farouq. Al Sharbi and others fled
17 the camp and were told to fire warning shots in
18 the air if they saw American missiles
19 approaching.

20
21 Shortly after the September 11 2001 attacks on
22 the United States, al Qahtani, a Saudi citizen
23 and Electrical engineering graduate of King Saud

1 University in Saudi Arabia, left Saudi Arabia
2 with the intent to fight against the Northern
3 Alliance and American Forces, whom he expected
4 would soon be fighting in Afghanistan.

5
6 In October 2001, al Qahtani attended a newly
7 established terrorist training camp North of
8 Kabul, where he received physical conditioning,
9 and training in the PK Machine gun and AK-47
10 assault rifle.

11
12 Between late December 2001 and the end of
13 February 2002, Abu Zubayda, a high-ranking al
14 Qaida recruiter and operational planner, assisted
15 in moving al Sharbi, al Qahtani and Binyam
16 Muhammad from Birmel, Afghanistan to a guest
17 house in Faisalabad, Pakistan where they would
18 obtain further training.

19
20 By early March 2002, Abu Zubayda, Barhoumi, al
21 Sharbi, al Qahtani, and Binyam Muhammad had all
22 arrived at the guesthouse in Faisalabad,
23 Pakistan. Barhoumi was to train al Sharbi, al

1 Qahtani and Binyam Muhammad in building small,
2 hand-held remote-detonation devices for
3 explosives that would later be used in
4 Afghanistan against United States forces.

5
6 In March 2002, after Barhoumi, al Sharbi and al
7 Qahtani had all arrived at the guesthouse, Abu
8 Zubayda provided approximately \$1,000 U.S.
9 Dollars for the purchase of components to be used
10 for training al Sharbi and al Qahtani in making
11 remote-detonation devices.

12
13 Shortly after receiving the money for the
14 components, Barhoumi, Noor al Deen and other
15 individuals staying at the house went into
16 downtown Faisalabad with a five page list of
17 electrical equipment and devices for purchase
18 which included, inter alia, electrical resistors,
19 plastic resistors, light bulbs for circuit board
20 lights, plastic and ceramic diodes, circuit
21 testing boards, an ohmmeter, watches, soldering
22 wire, soldering guns, wire and coil, six cell

1 phones of a specified model, transformers and an
2 electronics manual.

3
4 After purchasing the necessary components, al
5 Qahtani and al Sharbi received training from
6 Barhoumi on how to build hand-held remote-
7 detonation devices for explosives while at the
8 guest house.

9
10 During March 2002, after his initial training, al
11 Qahtani was given the mission of constructing as
12 many circuit boards as possible with the intent
13 to ship them to Afghanistan to be used as timing
14 devices in bombs.

15
16 After their training was completed and a
17 sufficient number of circuit boards were built,
18 Abu Zubayda had directed that al Qahtani and al
19 Sharbi were to return to Afghanistan in order to
20 use, and to train others to construct remote-
21 control devices to detonate car bombs against
22 United States forces.

1 During March 2002 al Qahtani wrote two
2 instructional manuals on assembling circuit
3 boards that could be used as timing devices for
4 bombs and other improvised explosive devices.

5
6 On March 28, 2002, Barhoumi, al Sharbi, al
7 Qahtani, Abu Zubayda and others were captured in
8 a safe house in Faisalabad after authorities
9 raided the home.

10

11 **Presiding Officer:** Thank you. Have counsel for both sides
12 read and do you understand the provisions of
13 Military Commission Order Number 1, which governs
14 protected information, Prosecution?

15

16 **APROS:** The prosecution has, sir.

17

18 **Presiding Officer:** Defense?

19

20 **DC:** The defense has, sir.

21

22 **Presiding Officer:** Thank you. Do you understand, both
23 sides, that you must, as soon as practicable,

1 notify me of any intent to offer evidence
2 involving protected information so that I can
3 consider the need to close the proceedings or
4 take other protective measures?

5

6 **APROS:** Yes, sir.

7

8 **DC:** Yes, sir.

9

10 **Presiding Officer:** Thank you. Is there any issue relating
11 to the protection of witnesses that needs to be
12 taken up at this time as necessary to litigate
13 motions or conduct other business before the
14 presentation of evidence on the merits?

15

16 **APROS:** Not at this time, sir.

17

18 **DC:** Not at this time, sir.

19

20 **Presiding Officer:** Thank you. I am required, by Military
21 Commission Order Number 1, to consider the safety
22 of witnesses and others at these proceedings so
23 does counsel for both sides understand that you

1 need to notify me of any issue regarding the
2 safety of potential witnesses so that I can
3 determine the appropriate way in which that
4 testimony would be received and the witnesses
5 protected?

6

7 **APROS:** Yes, sir.

8

9 **DC:** Yes, sir.

10

11 **Presiding Officer:** Thank you. Now the only protective
12 orders of which I am aware are Protective Orders
13 1, 2, and 3A which are marked RE 18, 19, and 57.
14 Is either side aware of any protective order
15 other than those three?

16

17 **APROS:** The prosecution is not, sir.

18

19 **Presiding Officer:** Defense?

20

21 **DC:** No, sir.

22

23 **Presiding Officer:** And have both sides read these orders?

1

2 **APROS:** Yes, sir.

3

4 **DC:** Yes, sir.

5

6 **Presiding Officer:** Thank you. All current Presiding
7 Officer Memoranda, as listed in RE 54 and
8 subsequent modifications of them are in effect as
9 the rules of court for this Commission. The
10 current filings inventory is marked as Review
11 Exhibit 57. Do counsel for both sides agree that
12 this is the accurate reflection of all filings,
13 motions, responses, replies, and requests for
14 relief to date?

15

16 **APROS:** Yes, sir.

17

18 **DC:** I think it is, sir, yes.

19

20 **Presiding Officer:** Thank you. Now, Colonel Broyles, are
21 you prepared to enter any motions?

22

1 **DC:** We would request the opportunity to defer
2 motions, sir.
3
4 **Presiding Officer:** Very well, I will allow you to do so.
5 Are you prepared to enter pleas, on behalf of
6 your client?
7
8 **DC:** We would request to defer pleas as well, sir.
9
10 **Presiding Officer:** I will allow you to do that as well.
11 That brings us to a discussion of the trial
12 order. Have counsel had the opportunity to
13 consider when motions should be due and when the
14 next session needs to be held?
15
16 **APROS:** Yes, sir.
17
18 **Presiding Officer:** Colonel?
19
20 **DC:** Yes, sir.
21
22 **Presiding Officer:** Well, I will issue a trial order that
23 will contain the following. Please, let me know

1 if you have any objections or requests for
2 modification:

3
4 I will direct that motions as to the discovery
5 order will be due on 12 May of this year;

6
7 Requests for access to evidence and witness
8 requests on access to evidence or discovery
9 motions also due on 12 May;

10
11 And I intend to direct litigation of discovery
12 and access to evidence motions on the 19th of
13 June session;

14
15 In addition, I will direct that your law Motion,
16 and by that I mean any motion except a motion to
17 suppress evidence or other evidentiary motions
18 will be due on the 19th of May;

19
20 Responses will be due on the 26th of May;

21
22 And replies, if any are desired, will be due by
23 the 2nd of June.

1

2 **DC:** Sir.

3

4 **Presiding Officer:** Yes.

5

6 **DC:** I do have objections to those dates, the law of
7 motions dates that is. Sir, that's--that's,
8 essentially, 3 weeks from today or thereabouts,
9 and that is woefully inadequate amount of time
10 for the sheer breadth of motions that will be
11 being served by defense. In fact, sir, I would
12 request that rather than set that date today,
13 that in fact the discovery motion be filed and
14 litigated before we again set the time for
15 motions. In fact, I was going to suggest that if
16 you were setting a deadline today for law of
17 motions that early September would be the time
18 that would be appropriate for the defense.

19

20 **Presiding Officer:** Why do you need so long?

21

22 **DC:** Well, sir, I also have discovery obligations, the
23 factual preparation of this case, which is due,

1 right now, approximately a month from now. I
2 anticipate, from other conversations with the
3 prosecution, that it will be, at best, a month
4 beyond that. I still have not received a large
5 quantity of discovery from the government. I
6 still have not had available--made available to
7 me a great variety of the witnesses on the
8 government's witness list, so my ability to do
9 that piece, which is due in approximately the
10 same time frame, and be preparing the law motions
11 and preparing the discovery motions and come out
12 to the island for a week in the middle of that to
13 litigate not to mention that we have scheduled
14 travel both the prosecution and the defense
15 overseas to investigate and interview witnesses
16 that takes place in early June, my schedule's
17 really packed for that time frame, sir,
18 considering--and I'm only talking about
19 obligations from the court.

20
21 **Presiding Officer:** Well, I understand. You were detailed
22 in December----

1 **DC:** Yes, sir.

2

3 **Presiding Officer:** ----were you not? And we're at April

4 and you're telling me you need an additional 4

5 months to get your legal motions together?

6

7 **DC:** In light of the other obligations, yes, sir. I

8 don't think that that's by any stretch and

9 excessive amount of time. And I simply point,

10 for illustrative purposes to the history of

11 motions in the Hicks case which is frequently

12 referred to the defense counsel that we should

13 review that--those motions ourselves in light of

14 what the history of motions filing is. That's

15 something on the order of 40 something motions,

16 sir, and I anticipate that it's going to be

17 pretty darn near that for the al Qahtani case

18 assuming I continue to----

19

20 **Presiding Officer:** Okay. Well, let's back up. Do you

21 have any objections or requests for alternate

22 dates to the discovery piece that I've already

23 discussed?

1

2 **DC:** Oh no, sir, the sooner the better. I was hoping
3 we'd do that this session.

4

5 **Presiding Officer:** Well, did you file a motion?

6

7 **DC:** I requested that we do it on this session and it
8 was denied, sir, and so no I didn't file the
9 motion.

10

11 **Presiding Officer:** Did you file a motion, Colonel?

12

13 **DC:** No, sir, I did not.

14

15 **Presiding Officer:** All right, then you'll not be heard on
16 that. When you file a motion, we will talk about
17 it.

18

19 **DC:** Well, sir, that was at the direction of the
20 Assistant to the Presiding Officer regarding the
21 discovery motions and that was not filed in time
22 for this----

23

1 **Presiding Officer:** Colonel, do I need to read you----

2

3 **DC:** ----simply by virtue of that.

4

5 **Presiding Officer:** -----all the times you've been advised

6 to file a motion under 4-3 with respect to

7 discovery?

8

9 **DC:** I believe I filed three motions with respect to

10 discovery, sir.

11

12 **Presiding Officer:** I'm not aware of any that you've filed.

13

14 **DC:** That's incorrect, sir.

15

16 **Presiding Officer:** I'm aware that you've sent a lot of e-

17 mail.

18

19 **DC:** No, sir. I've also filed. I filed a motion as

20 an amicus motion on behalf of the accused. I

21 filed a second motion----

22

23 **Presiding Officer:** Which is in the----

1

2 **DC:** ----which delineated----

3

4 **Presiding Officer:** ----inactive file as a result of the

5 ruling.

6

7 **DC:** Yes, sir.

8

9 **Presiding Officer:** Okay.

10

11 **DC:** But you had said that I had not filed motions and

12 that's not an accurate statement, sir. In fact,

13 you've implied that I've done nothing in regard

14 to this discovery motion several times on the

15 record.

16

17 **Presiding Officer:** No, I imply----

18

19 **DC:** That's also not accurate.

20

21 **Presiding Officer:** Colonel.

22

23 **DC:** Yes, sir.

1

2 **Presiding Officer:** I imply nothing. I read into the
3 record the REs. They speak for themselves.
4 You've been directed on a number of times.
5 Counsel requested--asked to file a motion under
6 4-3 to address any problems with discovery and
7 the record will speak for itself.

8

9 **DC:** Yes, sir. I should also note that you've even
10 mistakenly suggested when I was the attorney on
11 this case. I was detailed to this case, which is
12 accurate what you've said, I was not the attorney
13 on this case until your order to be the attorney
14 on this case, which took place in February, I
15 believe, sir.

16

17 **Presiding Officer:** You were detailed in December?

18

19 **DC:** Yes, that is correct, sir.

20

21 **Presiding Officer:** Okay. I just----

22

23 **DC:** But that was insufficient.

1

2 **Presiding Officer:** I just want to--well, you can argue
3 that. I'm trying to get my arms around why you
4 need so much time, and----

5

6 **DC:** Sir, I'm----

7

8 **Presiding Officer:** ----writing motions and getting
9 prepared, I'm not aware of anything that would
10 prevent a detailed counsel from getting prepared
11 even as he worked on whatever relationship he
12 needed to develop with his counsel, so--but
13 you're okay on the discovery motion section?

14

15 **DC:** Absolutely, sir.

16

17 **Presiding Officer:** Okay. So the issue with you is you
18 would like additional time to file your law
19 motions?

20

21 **DC:** Yes, sir.

22

1 **Presiding Officer:** And you're asking to delay until
2 September just to file them?

3

4 **DC:** Yes, sir.

5

6 **Presiding Officer:** What's the prosecution's position?

7

8 **APROS:** The prosecution will be ready to proceed under
9 the schedule you proposed, sir. With regard to
10 any delay, a delay 'til September would seem
11 unreasonable at this point. If additional time
12 were warranted, a much shorter period would
13 certainly suffice to file motions. We're talking
14 legal motions that shouldn't necessarily be
15 impacted by all of the discovery being provided.
16 It might, to a certain extent, but maybe not
17 totally. It would be our opinion that Colonel
18 Broyles should be able to proceed quicker than
19 September.

20

21 [Long pause.]

22

1 **Presiding Officer:** Okay, Colonel, I'll give you until the
2 16th of June to file your law motions. Responses
3 and replies will then be due pursuant to POM 4-3.
4 Requests for witnesses on the law motions are
5 also due the 16th of June and I will direct that
6 your law motions be heard beginning the trial
7 term of 10 July.

8
9 **DC:** Sir, I believe that I have a conflict of the term
10 10 July that I have requested to be excused from
11 because I have a law of war course, which
12 directly relates to my duties in this Commission.

13
14 **Presiding Officer:** Well, let's work with that schedule for
15 now. You're certainly free to come in at any
16 point as things go along and ask me to revisit
17 these dates based on developments, but it may
18 also depend on how many motions actually get
19 filed whether we can move the hearing date or
20 not, so since that's somewhat speculative at this
21 point, I'll set the hearing for the week of 10
22 July and subject to revision as needed and
23 requested by counsel.

1

2 Any questions about those dates?

3

4 **APROS:** Sir, with regard to the deadline for the
5 responses to law motions.

6

7 **Presiding Officer:** Yes.

8

9 **APROS:** Per POM 4-3 that would be, I believe, the 23rd of
10 June. We'll be litigating the discovery motions
11 that week, so I wouldn't want to push that date
12 at this point in case we can still make it but at
13 a later time, the government may make a special
14 request to extend that deadline for us.

15

16 **Presiding Officer:** Well, I expect as we move along things
17 will inevitably change, so let's set this as a
18 goal and a workable structure to work towards and
19 as matters present themselves, feel free to
20 advise me, request an 8-5 conference where we can
21 fine tune things if necessary or request formal
22 relief through a motion. But are you aware of
23 any other conflicts with these dates?

1

2 **APROS:** No, sir.

3

4 **Presiding Officer:** Colonel Broyles?

5

6 **DC:** Not other than that previously stated, sir.

7

8 **Presiding Officer:** Okay. And while I'm going to reserve
9 evidentiary motions and litigation of those
10 motions in light of the dates that we've already
11 set because we're getting so far ahead that I
12 don't know that it's really meaningful or useful
13 to set things out that far, however, as things
14 move along, we can set those motions.

15

16 Is there anything additional either side needs to
17 take up on the record in this case?

18

19 **APROS:** No, sir.

20

21 **DC:** No, sir.

22

1 **Presiding Officer:** Very well, this Commission is in

2 recess.

3

4 *The Commissions Hearing recessed at 1445, 25 April 2006.*

**AUTHENTICATION OF
FINAL SESSION TRANSCRIPT**

in the case of:

United States v. Jabran Said Bin al Qahtani

a/k/a Salam al Farsi

a/k/a Hateb

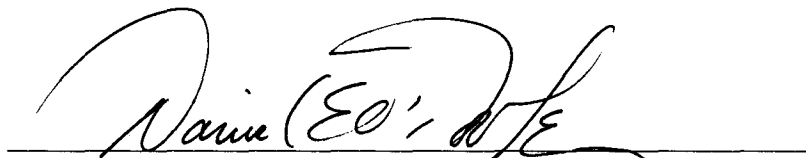
a/k/a Jabran al Qahtan

a/k/a Saad Wazar Hatib Jabran

a/k/a Jabran Saad Wazar Sulayman

a/k/a Jabran Wazar

This is to certify that the pages 1 through 139
(Authentication page) are an accurate and verbatim
transcript of the proceedings held in the above styled
case on April 25, 2006.



Daniel E. O'Toole
Captain, JAGC, U.S. Navy
Presiding Officer



DATE